Residential Tenancy Commission

Summaries of Significant Decisions

1985 6 R.T.C.

86-04694/

RESIDENTIAL TENANCY COMMISSION

SUMMARIES OF SIGNIFICANT DECISIONS - VOLUME 6

CITED (1985), 6 R.T.C.

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This represents the sixth in a series of volumes of Summaries of Significant Decisions of the Commission. Cases selected for publication include decisions made by individual Commissioners at initial hearings, as well as decisions made by Appeal Panels of the Commission at appeal hearings. Cases summarized herein are based on decisions made to June, 1985.

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Summaries of Decisions
Volume 6

RESIDENTIAL TENANCY COMMISSION

SIGNIFICANT DECISIONS

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IN THE MATTER OF: 105 Winlane Drive
Stouffville, Ontario

AND IN THE MATTER OF an appeal by Richpark Investments Ltd. (Landlord)

APPEAL PANEL: E.J. Pollock, G.E. Isaac, L.V. Wilton

DATE OF ORDER: August 2, 1984

FILE NUMBER: A-2852

ISSUES: Appeal - role of Appeal Panel - knowledge of landlord's agent attributed to principal

The landlord appealed the decision of Commissioner Burnside dismissing its application for rent review under s.126 of the Residential Tenancies Act.

At the initial hearing, Commissioner Burnside expressed concern over the fact that the accounting periods used in the landlord's application had been changed from those used in a previous Order. He noted that the change could have the effect of higher costs being passed through to the tenants which would be unfair and would create the appearance of injustice.

The Commissioner directed the landlord's appointed agent to file material in support of this change. The agent did not comply with the Commissioner's direction and the application was dismissed.

The landlord appealed the dismissal on the grounds that his agent did not represent him properly.

The Appeal Commissioners explained to the landlord that if they were to hear the application, they must first determine that the Commissioner erred in dismissing the application. The burden of proof rested with the appellant to convince the panel that there had been an error.

After hearing the landlord's submissions the appeal panel concluded that Commissioner Burnside did not err in dismissing the application. The landlord had argued for a new hearing on the basis that its agent had failed to represent its interests at the initial hearing. The members of the panel noted

that the authority to make the application and represent the landlord's interests were vested in the agent. Furthermore, they stated, it is a rule of law that the knowledge of the agent is attributed to the principal, and the Commissioner was entitled to rely on this. The panel concluded that the landlord could not remedy the agent's breach and continue the proceedings at the appellete level.

The panel affirmed the decision of Commissioner Burnside.*

*Note: An application to the Divisional Court for judicial review of this decision has been filed.

* * * * *

IN THE MATTER OF:	179 Monterey Drive Nepean, Ontario
BETWEEN:	Jean Martin and John Martin (Tenants) - and - Redwood Residences Limited (Landlord)
COMMISSIONER:	J.L.H. Sprague
DATE OF ORDER:	March 4, 1985
FILE NUMBER:	127-785-OT
ISSUES:	Bias - whether Commissioner hearing a second series of s.127 applications gave rise to an apprehension of bias - Procedure - failure to comply with s.60

This was one of a series of applications under s.127 of the Residential Tenancies Act by tenants of the residential complex for a reduction in the proposed rent increase.

At the hearing, both the counsel for the landlord and the agent for the tenants requested that Commissioner Sprague step down from the hearing of this application because he had presided over a number of earlier s.127 applications made by different tenants of the same complex.

Commissioner Sprague explained the nature of "bias". He said that bodies such as the Commission which exercise quasi-judicial functions are subject to the rules of natural justice. One of these rules is that the hearings be fair and impartial. Therefore, the adjudicator must be free from any bias. He stated that this rule requires the adjudicator to act in good faith and with an open mind, not foreclosed to any argument. Furthermore, there must be a reasonable apprehension or a real likelihood of bias before it can be said to exist.

The agents for the landlord and tenants both asserted that such a reasonable apprehension of bias existed because Commissioner Sprague had adjudicated several other s.127 applications by different tenants against the same landlord.

Commissioner Sprague stated that his decisions on this series of applications had no bearing at all on the decisions he made in the first series. He stated that he was not sitting on the same dispute because there were different tenants involved and additional issues and evidence to consider. The Commissioner said that the real question was whether a reasonable person would doubt that the matters raised in this hearing could be received with an open mind. Commissioner Sprague assured the parties that he had not pre-judged the present applications and would make findings solely on the basis of evidence presented at the hearing just as he had done for the first series of applications. He stated that if a party convinced him to reach a conclusion that differed from one made on a similar issue in the first series, he would not hesitate to do so.

Commissioner Sprague was referred to the cases of Re Township of Vespra and the Ontario Municipal Board et. al. (1983), 43 O.R. (2nd) 680 and Bartoski v. Moody (1983), 4 Admin. L.R. 60, both involving allegations of bias and both decided by the Divisional Court. The Commissioner distinguished the Vespra decision because in that case, the same panel of the O.M.B. was re-sitting on the same application it had previously heard and on which it had rendered a decision. In addition, the panel had refused to hear new evidence at the second sitting. The Commissioner also distinguished the Bartoski case because there, the adjudicator of a discipline hearing for a constable had already made rulings against the same constable in previous hearings. This was different from the matter before the Commissioner because in Bartoski,

the adjudicator was required to make determinations on credibility in the prior hearings and this gave rise to an apprehension of bias. Commissioner Sprague stated that he made no such determinations in the first series of s.127 hearings.

For the above reasons, Commissioner Sprague refused to step down and went on to hear the applications before him.

The Commissioner then found that the landlord's notice of rent increase which was disputed by this application did not mention the amount to be paid for an extra parking space used by the tenants. He held that in s.60 of the Residential Tenancies Act (which requires that notice of rent increases be given) the word "rent" refers to the amount levied for the unit itself and to all services and facilities provided. Therefore, he concluded that the landlord's notice of rent increase was defective.

The Commissioner then referred to s.121 of the Residential Tenancies Act which allows the Commission to accept documents, forms and notices which do not conform strictly to the requirements of the Act as long as there has been substantial compliance with the requirements and no unfairness would result if they were accepted. The Commissioner was of the opinion that s.121 did not apply to the notice requirements of s.60 but held that if it did apply, there was no substantial compliance with those requirements anyway because an essential element was omitted.

Therefore, Commissioner Sprague held that the proposed rent increase was void, so there was no increase which he could order reduced. As a result the Commissioner dismissed the application.

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IN THE MATTER OF: 25 Hotspur Road
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Irene Fleischman (Landlord)

COMMISSIONER: N.G. Stanwick

DATE OF ORDER: January 9, 1985

FILE NUMBER: 126-056-NY

ISSUES: Bias - whether there is an apprehension of bias when an M.P.P. acts as an agent before the Commission

The landlord applied for rent review under s.126 of the Residential Tenancies Act.

The landlord's agent made a preliminary request that the agent for the tenants be prohibited from acting as an agent because he was an M.P.P. The agent argued that although the landlord had no actual apprehension of bias, a reasonable person disinterested in the outcome of the present application would have such an apprehension upon seeing an M.P.P. acting as an agent.

The tenant's agent submitted that there was nothing in law or practice that would prevent him from representing the tenants, and his role as an M.P.P. was not relevant to the proceedings.

The Commissioner referred to Commission Guideline P-1 and legal authorities which stated that the law imposes a high standard with regard to allegations of bias in the administration of justice. The authorities state that a decision-maker must be impartial and free from bias, and even a reasonable apprehension of that person being biased is enough to prohibit him or her from proceeding to make a decision.

Commissioner Stanwick then referred to s.71, s.72 and s.75 of the Residential Tenancies Act which deal with the appointment and terms of payment of Commissioners. She noted that M.P.P.'s do not vote on the appointment or

reappointment of Commissioners nor do they determine their salaries or working conditions. She also noted that the broad discretionary powers in the Residential Tenancies Act are not limited by political concerns.

After reviewing the authorities and hearing the submissions of the parties, she concluded that neither actual bias, nor any reasonable apprehension of bias existed. The Commissioner stated that any person can appear as an agent if that person is properly authorized to do so, and as an agent the person must deal with the relevant issues and make no political statements.

In view of these conclusions, the Commissioner proceeded to hear the application and determine the justified increase.

This Order was subsequently appealed and set aside on unrelated grounds.

* * * * *

IN THE MATTER OF: 1 Rosedale Road
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Interconinvest (Canada) Inc., (Landlord)

APPEAL PANEL: H.F. Snyder, R. Yurkoski and R.S. Bentley

DATE OF ORDER: January 21, 1985

FILE NUMBER: A-3648

ISSUES: Capital Expenditures - when a capital expenditure may be treated as an acquisition cost

The landlord appealed an Order of Commissioner Sagoo made pursuant to an application for rent review under s.126 of the Residential Tenancies Act.

One ground of the landlord's appeal was that the cost for repairs to the roof of the complex was incorrectly treated as an acquisition cost rather than a capital expenditure. The Commissioner referred to Commission Guideline

R.R.-3 and held that it was appropriate to add the cost of this capital expenditure to the purchase price because it was incurred within one year of the acquisition of the complex.

The agent for the landlord argued that at the time of acquisition, the landlord had no knowledge that the roof would leak in the winter nor should he have been expected to have prior knowledge of this situation. Since the need for such repairs had not been foreseen, no reduction in the purchase price had been negotiated. It was contended that since this was an emergency capital expenditure, it should be treated as a "traditional" capital expenditure and not added to the acquisition cost for the purposes of rent review.

The agent for the tenants claimed that Commissioner Sagoo had considered all the relevant evidence and properly exercised his discretion to treat the roof repairs as a cost of acquisition. He asserted that the appeal panel should not disturb that proper exercise of discretion.

The members of the appeal panel considered the arguments and concluded that the roof repairs should be treated as a capital expenditure and not as a cost of acquisition. They found that the landlord had acted as a prudent purchaser and the need to repair the roof arose from an unanticipated situation.

The members of the panel then referred to Guideline R.R.-3, which suggests that substantial capital expenditures incurred in the first year after acquisition may be treated as a cost of acquisition. The Appeal Commissioners set out a number of criteria to be considered before applying this Guideline. They noted, however, that these criteria were not exhaustive. The criteria were:

- Was the financing of capital improvements related to purchase financing?

- Were the improvements part of a scheme planned before or at the time of purchase, or could they have been planned or anticipated?

- Were the expenditures substantial in relation to the purchase price?

- What was the nature of the capital improvement; was it integral to the fabric of the residential complex?

- Was it forseeable at the time of purchase?

The panel commented that if the answers to the above questions are "no", it should be treated as a capital expenditure; if "yes", then it should be treated as an acquisition cost. In this case, the panel decided that the answers to these questions were "no" to the first two; "possibly" to the third; "yes" to the fourth; and "no" to the fifth. On balance, based on these criteria, the panel held that the roof repairs should be treated as a capital expenditure.

The Order of Commissioner Sagoo was accordingly set aside.

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IN THE MATTER OF: 2001 Bloor Street West
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by 448838 Ontario Limited (Landlord)

COMMISSIONER: D. Richardson

DATE OF ORDER: September 11, 1984

FILE NUMBER: 126-565-TO

ISSUES: Capital Expenditures - whether costs incurred by previous landlord can be claimed by the present landlord

Financial Loss - recalculated on sale of the property within 3 years

The landlord applied for rent review under s.126 of the Residential Tenancies Act.

At the hearing, the tenants contended that the landlord's claim for $112,594 in capital expenditures should be disallowed because these costs were incurred by the prior landlord. They argued that if this claim was accepted, the landlord would benefit from a double recovery because the purchase price of the complex would have been increased in recognition of these expenditures and the subsequent financing costs would have been passed through to the tenants. They contended that the same costs should not be passed through again by a "write-off" allowance.

The landlord's solicitor submitted that there was no foundation in the Act or Guidelines to support the tenants' position. He argued that it was appropriate to claim the capital costs incurred by the previous landlord so that the depreciation of these items would be recognized.

Commissioner Richardson noted that the Guidelines do not deal with such costs upon a change of landlord. However, she determined that this was not a situation where it would be appropriate to allow a claim for such costs because there was an increase of $445,000 in the purchase price in less than three years and an increase in subsequent financing costs. The Commissioner concluded that on the balance of probabilities, the increased purchase price included the costs of the capital expenditures and that this would already be included in the rent structure through the pass-through of the financing costs. She stated that separate recognition of an annual write-off for capital expenditures would lead to a double allowance. Accordingly, Commissioner Richardson did not accept the landlord's claim for capital expenditures.

In considering the financial loss calculation, Commissioner Richardson referred to Commission Guideline RR-4 which suggests that if a building has been sold within three years of its purchase (as in the present case), the loss applying to the previous landlord should be passed through before any consideration is given to the further loss experienced by the present owner. However, she stated that in the circumstances of this case, she would not exercise her discretion to allow the historical amount calculated in a previous Order but would proceed to recalculate the financial loss. The Commissioner explained that the period of ownership of the prior landlord was only one month less than the three years mentioned in the Guideline, and therefore it

was a marginal case for the application of the suggested treatment of financial loss. In addition, she held that it was appropriate to recalculate the financial loss at this point to reflect the financing costs incurred as a result of the extensive capital expenditures in 1982-83 which had not been included in the previous financial loss calculation.

The Commissioner went on to determine the justified rent increase for the complex.

* * * * *

IN THE MATTER OF: 20 Clarke Avenue
Thornhill, Ontario

AND IN THE MATTER OF an application for rent review by Del Corporation Limited (Landlord)

COMMISSIONER: D.R. Snider

DATE OF ORDER: April 10, 1985

FILE NUMBER: 126-076-NY

ISSUES: Capital Expenditures - allowance made for proposed expenditures

The landlord applied for rent review under s.126 of the Residential Tenancies Act.

The Cost Revenue Statement submitted by the landlord contained seven claims for proposed capital expenditures. The only proof filed was a non-arm's length contract between the landlord and a construction company which was related to the landlord corporation.

Commissioner Snider noted that Guideline R.R. 3 issued by the Commission suggests that proposed capital expenditures should be allowed only where the Commissioner is completely satisfied that the work will be done. He added

that he also would have to be assured that the work would be completed in the projected year and at the exact cost specified before he would accept proposed capital expenditures.

The Commissioner stated that he was not fully satisfied that the work would be carried out by the scheduled dates or at the cost specified because the contract was non-arm's length. However, he also stated that the landlord had been reliable in these matters in the past and the tenants had expressed the desire to have the work done. Commissioner Snider said he did not want to defeat the proposals by completely disallowing them in his Order.

In light of this situation, the Commissioner decided to allow one-half of the cost of each improvement, amortized over its useful life, to be passed through in this review. He stated that this would encourage and arguably obligate the landlord to complete the work and to apply for rent review in the next year to recover the remaining amounts of capital costs not allowed in this review.

The Commissioner went on to determine the justified increase for this complex.

* * * * *

IN THE MATTER OF: 103-105 West Lodge Avenue
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Captall Investments Limited (Landlord)

APPEAL PANEL: E.J. Pollock, W.D. Biggar and G.R. Tait

DATE OF ORDER: November 15, 1984

FILE NUMBER: A-3482

ISSUES: Capital Expenditures - whether Commissioner exercised discretion properly in disallowing costs

This was an appeal on behalf of the landlord from the Order of Commissioner Sagoo dated June 8, 1984. The matter came before the Commission by way of an application for rent review under s.126 of the Residential Tenancies Act. The complex was acquired by the landlord in 1979 and had been the subject of two previous rent review Orders.

The landlord's appeal included the grounds that Commissioner Sagoo erroneously and improperly reversed a finding in a previous order that allowed an annual write-off of $12,932 for capital expenditures, and that the treatment of capital expenditures in this review was incorrect.

At the initial hearing, Commissioner Sagoo found that when the landlord acquired the building in 1979 he had received a $175,000 abatement of the purchase price from the Vendor. This abatement was arranged to compensate the landlord for capital works that the Vendor was obligated to complete, but which he did not do. The Commissioner stated that the landlord/purchaser had hired contractors to complete the capital works instead of paying the $175,000 to the Vendor as part of the purchase price. Commissioner Sagoo then found that the existence of this abatement was not known to the Commissioners at the two previous reviews and that they had allowed for the write-off of capital expenditures in their Orders. Commissioner Sagoo held that the landlord should not have been allowed to write-off $175,000 in capital expenditures when this amount had already been recognized by way of the reduced purchase price.

In view of this situation, the Commissioner did two things. The Commissioner stated that he had no authority to tamper with the write-off that had been allowed in the first Order. However, he did not make an allowance for $61,428 for capital expenditures that was justified in this review. In addition, he negated the annual capital expenditure write-off of $12,932 allowed in the immediately prior review, calling it a "cost correction."

The appeal panel disagreed with the Commissioner's treatment of capital expenditures. The abatement of $175,000 was not a matter that he should have considered because the situation occurred in 1979 and was dealt with in prior uncontested orders. As such, the matter was "res judicata".

With respect to the negation of the annual write-off that had been allowed in the previous order, the panel found that this was not a "cost correction" but an unauthorized change to a discretionary decision of the previous Commissioner. Such decisions may only be challenged on an appeal of the Order concerned or through the Courts.

The Order of Commission Sagoo was set aside by the appeal panel.

* * * * *

IN THE MATTER OF: 80 Coe Hill Drive
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by 80-100 Co-Ownership Group (Landlord)

COMMISSIONER: D.B. Braund

DATE OF ORDER: July 20, 1984

FILE NUMBER: 126-834-TO

ISSUES: Co-ownerships - who is the "landlord" - what is the "residential complex"

This matter came before the Commission by way of an application for rent review under s.126 of the Residential Tenancies Act.

The building for which this application was made was purchased along with an adjacent building at 100 Coe Hill Drive by a company known as 549013 Ontario Limited. This company then sold its interest in the properties to 132 separate persons, who as co-owners acquired undivided percentage interests in the properties. The total of the percentage interests given to the co-owners amounted to 100%, therefore Commissioner Braund concluded that no interest in the premises had been retained by the Vendor corporation. Each co-owner entered into a "Co-Ownership Agreement" between the numbered company and the individual co-owner. The Commissioner reviewed the terms of the Agreement in detail in order to determine who was the proper "landlord" and what was the "residential complex" for the purposes of a rent review application in this situation.

Commissioner Braund found that each co-owner had an absolute right as between the various co-owners to the use and occupancy of a particular suite or suites, as specified in the Agreement, rent free. It was further provided that an "association" would be formed by the co-owners to manage the affairs of the property by resolution and that a Board of Directors would be appointed to conduct its day to day affairs.

Another entity created by the Agreement was the "Co-Ownership" which had different rights and was defined as "the aggregate of all the owners of the subject properties." The Commissioner was unable to determine by reference to the Agreement whether "80-100 Co-Ownership Group", the named applicant for this review, was the "association" of co-owners or the entity known as the "Co-Ownership."

The Board of Directors entered into an agreement with United Lands Management to act as property managers for the building. On the Form 2 application filed, United Lands Management was designated as the landlord's agent and a representative of United Lands signed the application. The solicitor for the applicant contended that the right of the management company to bring the application flowed through the management agreement between the Board and United Lands. Since the manager had the authority to list, offer and enter into leases for space in the building, it became a "person permitting occupancy of a rental unit" which satisfies the definition of "landlord" in the Residential Tenancies Act, s.1(l)(d).

Commissioner Braund rejected this submission. He held that it was only the person with the right to possession who could, in law, permit occupancy in the sense that the word "occupancy" is used in s.1(l)(d) of the Act. He also held that the manager in this case did not have an unqualified power to enter into tenancy agreements anyway, as none of the co-owners' agreements examined clearly delegated this authority. To hold otherwise, he stated, would mean that a real estate agent who merely leases apartments on commission would become a landlord.

Commissioner Braund referred to a decision of the Divisional Court issued on July 7, 1983, Liebert et al. v. Residential Tenancy Commission et al. (unreported) and held that the key elements in determining who is a

"landlord" are control of the units, and the right to receive rent. The Commissioner was not convinced that the manager satisfied either of the two elements of that test. The Commissioner accepted that a management company could be a landlord, but was unable to make such a finding on the facts of this particular case.

Having found that neither the co-owners' association, nor the manager was a landlord under the Residential Tenancies Act and that they had no status to bring an application, the Commissioner held that the application was a nullity.

Commissioner Braund then went on to determine what was the "residential complex" in this situation. He concluded that the individual co-owner complexes were the proper complexes for the purposes of rent review applications. The Commissioner explained that this was desirable in light of the Residential Complexes Financing Costs Restraint Act, 1982, because the Commission has to apply the same percentage increase to every unit in the complex according to that Act. So, for example, one tenant whose landlord/co-owner had no financing costs would have his rent increased for financing costs experienced by other co-owners relating to other units. The Commissioner was of the opinion that issuing one Order for the entire building would be prejudicial to some tenants and co-owners and that in view of the Liebert case, there was no legal authority to proceed other than by issuing a separate Order for each co-owner.

Finally the Commissioner considered whether it would be proper to amend the application pursuant to s.101 of the Residential Tenancies Act. He refused to do this because he had found the application to be void on two grounds (the application was made by an entity with no standing to apply under s.126 and the "residential complex" which was the subject of the application was not the proper one). In view of this, Commissioner Braund said that it was beyond his authority to amend a void application which is not known in law.

The application was dismissed.

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IN THE MATTER OF: 4 Treewood Street
Scarborough, Ontario

AND IN THE MATTER OF an application for rent review by Cedarwell Investments Limited (Landlord)

COMMISSIONER: D.B. Braund

DATE OF ORDER: April 4, 1985

FILE NUMBER: 126-475-SB

ISSUES: Cost Correction - explanation of negative cost correction - limited dividend project

This was an application under s.126 for whole building rent review.

At the hearing, the agent for the landlord objected to any possibility of a finding that a negative cost correction would be applied to the justified rent increase. He submitted that the Commission should not look at costs relating to previous years and that it was unrealistic to find a cost decrease. In addition, the agent contended that since the building was a limited dividend project which was a social policy venture for the benefit of the tenants and not a profit making venture, the Commission should not implement every rule available which would reduce the proposed increase. He asserted that where discretion exists, it should be used in favour of allowing an increase in rents in these circumstances.

Commissioner Braund responded by explaining the nature of a cost correction. Referring to Guideline R.R.-17 of the Board of Commissioners, he said that a cost correction is an adjustment made when the projected costs in a prior review (which are only anticipated costs) differ from the Year 2 costs found in the present review (which are based on evidence of actual total costs). When the anticipated cost findings in the first review exceed the actual cost findings in the next review, a negative cost correction should be included in the calculation of the justified rent increase.

In response to the agent's claim that a negative cost correction was a finding of decreased costs, the Commissioner explained that this was a mistaken view of the cost correction calculation. He stated that it is actually a finding based on the real merits and justice of the case which is required by s.93 of the Act. In this case, the actual cost increases experienced by the landlord were less than those anticipated and allowed in the previous Order for the same twelve month period. The Commissioner was of the opinion that to ignore this would be to ignore the true merits of the application.

In addition, Commissioner Braund explained that limited dividend buildings were not excluded from the application of cost corrections. He noted that discretion may not be used by a Commissioner to allow a greater increase to one landlord than another unless that greater increase is "justified" by the cost findings as to which the Commission has jurisdiction.

Commissioner Braund went on to determine the justified rent increase for the complex.*

*Note: This Order has been appealed to a panel of the Commission.

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IN THE MATTER OF: 9-11 Walmer Road
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Salford Investments Ltd. (Landlord)

APPEAL PANEL: J.H. Thomson, L.V. Wilton, M. S. Green

DATE OF ORDER: December 12, 1984

FILE NUMBER: A-3523

ISSUES: Cost Correction - whether cost correction can be performed for Year 1 costs

The landlord applied for rent review under s.126 of the Residential Tenancies Act. Commissioner Wronecki heard the matter and issued an Order. The tenants appealed that Order.

Counsel for the tenants argued that Commissioner Wronecki erred by refusing to perform a negative cost correction. She stated that the landlord had exaggerated the projected costs at a previous review. The solicitor referred to the Cost Revenue Statement which showed that the declared operating costs for Year 1 were $153,113 while in the Order issued immediately prior to Year 1, Commissioner Browes had allowed a Projected Year operating cost total of $165,687. Therefore, the tenants were requesting a negative cost correction of $12,574.

Commissioner Wronecki had refused to perform a negative cost correction in this case because he held that costs declared for Year 1 were for information purposes only. Furthermore, he said that there was no evidence that those costs were the actual costs incurred.

The Appeal Commissioners stated that since the landlord signed a solemn declaration in his application to the Commission, this should be regarded as a verification of the costs claimed. Accordingly, they did not agree that Year 1 costs were for information purposes only. The panel held that Year 1 costs were subject to the review process.

The panel then performed a cost correction. In doing so, they eliminated cost items that could not be properly compared (items that were claimed in one of the subject years but not in the other).

The panel set aside the Order of Commissioner Wronecki.

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IN THE MATTER OF: 25 St. Dennis Drive
North York, Ontario

AND IN THE MATTER OF an application for rent review by Grenoble Apartments (Toronto) Limited (Landlord)

APPEAL PANEL: D.B. Braund, J.H. Thomson, J.B. Jennings

DATE OF ORDER: December 19, 1984

FILE NUMBER: A-3509

ISSUES: Cost Correction - whether it is possible to amortize a substantial cost correction

The landlord applied for rent review under s.126 of the Residential Tenancies Act. At the initial hearing, Commissioner Burnside treated part of the cost correction figure as a capital expenditure and amortized it over 5 years. He stated that it was appropriate to spread the pass-through of these costs over a number of years because the figure was substantial and resulted from special circumstances, particularly from a change in maintenance policy.

The landlord's agent argued that the Commissioner erred in capitalizing cost corrections for certain categories of operating costs. He stated that this approach was prejudicial to the landlord. Furthermore, he contended that the landlord was being penalized for higher spending and that it was necessary for him to be reimbursed in the present review for all the money spent on maintenance.

The tenants' solicitor contended that the Commissioner had been faced with a peculiar situation which required special treatment and that his decision was fair in the circumstances. He also likened the lack of dollar for dollar allowance in the current review to the ordinary treatment for capital expenditures for rent review purposes.

Based on the evidence presented, the majority members of the appeal panel adjusted Commissioner Burnside's treatment of cost correction. They decided to apply the total cost correction to the current review.

Commissioner Braund dissented from the reasoning of the majority of the panel. He stated that Commissioner Burnside did not err in using his discretion to amortize certain cost corrections. He said that the pattern of activities of the complex showed that the substantial increase in operating costs was not normal and in light of this, Commissioner Burnside's treatment was innovative, but appropriate. Commissioner Braund concluded that he would have dismissed this ground of the landlord's appeal and affirmed Commissioner Burnside's approach to cost correction.

In the result, the majority of the panel set aside Commissioner Burnside's Order.

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IN THE MATTER OF: 2600 Baseline Road
Ottawa, Ontario

AND IN THE MATTER OF an application under s.127 of the Residential Tenancies Act by R. Brennan (Tenant)

COMMISSIONER: J.L.H. Sprague

DATE OF ORDER: August 29, 1984

FILE NUMBER: 127-709-OT

ISSUES:
- Disputed Rent Increase
- Standard of Maintenance and Repair
- Considerations on a s.127 application
- Procedure - representative actions - s.95

This was one of a series of applications by tenants seeking an Order requiring the landlord to reduce the proposed rent increase for each of their units. The landlord, Redwood Residences Ltd., had proposed a rent increase of 6 percent.

Counsel for the tenants submitted a preliminary motion for the Commissioner to make an Order under s.95(2) of the Residential Tenancies Act for a representative or class action which would authorize one person to represent all the tenants for this series of applications and allow for one final Order applying to all to be made.

Commissioner Sprague stated that s.95(2) of the Residential Tenancies Act was substantially similar to s.119 of the Landlord and Tenant Act which introduced provisions for representative actions into the summary procedure of that Act. He also noted that the counterpart to these sections was found in rule 75 of the Rules of Practice and stated that it was proper to look to that rule for guidance in interpreting s.95(2). The Commissioner referred to various legal authorities on class actions, including a decision of the Ontario High Court in the case of Beyer v. Absamco Developments Ltd. (1976), 12 O.R. (2d) 768. In that case it was held that the elements necessary for a class action were:

1. The plaintiff must specify the names of the persons who the plaintiff seeks to represent.

2. The persons so named must have an identity of interest with the named plaintiff.

3. In the case of a tenancy agreement, if the tenants each have different contracts with the landlord and pay the rent directly to him, it cannot qualify as a class action.

4. The persons so named must be members of the class as of the time the writ was issued.

With reference to the applications before him, the Commissioner said that the requirements had not been met by the tenants because:

1. the tenants had not identified which of the 72 applications they intended to use as the representative application.

2. There was insufficient "identity of interest". The Commissioner said that there had to be more than just a similar interest to satisfy this requirement.

   Regarding the matter before him, Commissioner Sprague stated that there might be different defences available to the landlord for some of the subject applications and in addition, different calculations would be required for each unit so there was no "identity of interest".

3. The Commissioner said that the tenants each had separate contracts with the landlord so the third requirement was not met.

4. Commissioner Sprague said that the fourth requirement of the Beyer case might be satisfied only if units with increases effective on the same date were included in the representative action.

Finally, the Commissioner concluded that there was no advantage to be gained in making an order under s.95 compared to determining the issues at a common hearing under s.104 which was done in this case. Therefore, he refused to make such an order.

The Commissioner then reviewed the evidence relating to the tenant's claim under s.127. He held that he had to determine if there was a deterioration in the standard of maintenance during the twelve-month period prior to the date when the proposed increase was to take effect.

Commissioner Sprague found that there had been a very serious deterioration in the level of snow removal during the subject period. The inadequate snow removal resulted in impaired access to the complex and temporary cessation of garbage pick-up and postal service. The Commissioner held that it was the landlord's responsibility to remove the snow and the landlord could not defend his inaction by claiming that he had "done his best." In addition, he held that the increased cost of snow removal for the subject period was also not a defence under s.127. The Commissioner commented that under these circumstances, a landlord should apply to the Commission for an increase above 6 percent. He added that allowing the standard of maintenance to deteriorate to lower the costs was not an option that was available to the landlord. The Commissioner also determined that this deterioration affected all of the subject units equally.

The Commissioner concluded that a decrease of 2 percent in the proposed increase was appropriate in view of the deterioration in the standard of maintenance and the serious hardship that the tenants experienced as a result.

Accordingly, Commissioner Sprague reduced the landlord's proposed increase to 4 percent from 6 percent.*

*Note: This Order was affirmed by an appeal panel of the Commission.

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IN THE MATTER OF: Apartment 606
2 Sultan Street
Toronto, Ontario

BETWEEN: Sultan Street Housing Co-operative Inc. (Landlord)

- and -

Cheryl G. Toal (Tenant)

APPEAL PANEL: G.R. Tait, G.E. Isaac, D.B. Braund

DATE OF ORDER: November 22, 1984

FILE NUMBER: A-3514

ISSUES: Exemption - does s.134(1)(b) exempt rental units situate in a non-profit housing co-operative occupied by non-members of the co-operative

The tenants applied for a rent rebate under s.129 of the Residential Tenancies Act. At the initial hearing, Commissioner Richardson decided that the exemption provided by s.134(1)(b) of the Act did not exempt the entire residential complex owned by a non-profit housing co-operative (such as the landlord), but only those units which were occupied by members of the co-operative. She stated that because the applicant was not a member of the co-operative that bought the complex at 2 Sultan Street, her unit remained subject to the Residential Tenancies Act. Accordingly, the Commissioner ordered the co-operative to rebate excess rent paid by the tenant.

The landlord appealed this Order on the grounds that the Commissioner erred in deciding that s.134(1)(b) did not exempt the entire complex from rent review.

Counsel for the landlord stated that the applicant tenant was not a member of the Housing Co-operative but did live in premises acquired by the Co-operative. He submitted that upon acquisition of the complex, s.134(1)(b) came into effect and exempted non-members from Part XI of the Residential Tenancies Act. The solicitor pointed out that he was relying on the latter

part of s.134(1)(b) which reads "... or situate in a non-profit co-operative housing project as defined in the National Housing Act (Canada)." He then referred to the definition of "Co-operative Housing Project" in the National Housing Act" and noted that it specifically included housing projects acquired by a co-operative association. This, he said, indicated that the residential unit immediately became exempt from Part XI of the Residential Tenancies Act upon acquisition because of s.134(1)(b). The solicitor argued that the meaning of s.134(1)(b) was self-explanatory and its purpose was to exclude all such rental units from Part XI regardless of the status of the occupant as a member or non-member of the housing co-operative.

Counsel for the tenant disagreed with the landlord's interpretation of s.134(1)(b). In his submission, the purpose of the section was to exempt only members from Part XI of the Residential Tenancies Act. He contended that since the purpose of the Residential Tenancies Act was to protect tenants, it would be unfair to deprive a tenant of such protection simply because a housing co-operative decided to acquire the complex in which she lived. The only way to fulfill the intent of the legislation would be by interpreting s.134(1)(b) to mean that non-members were not exempt from Part XI of the Residential Tenancies Act.

The members of the appeal panel stated that the plain meaning of the words used in s.134(1)(b) must be considered unless it would lead to absurdity. They noted that the law relating to statutory interpretation requires that the plain meaning be accepted if no inconsistency or absurdity results. The panel held that on a plain reading of s.134(1)(b), all units in a non-profit co-operative were exempt. The panel also commented that the provision of an exemption by the Legislature was not inconsistent with the scheme of rent regulation and that no internal inconsistency or absurdity arose from a plain reading of the section. Therefore, they concluded that s.134(1)(b) exempted the subject rental unit from Part XI of the Residential Tenancies Act.

In view of the conclusion that s.134(1)(b) exempted all units situate in non-profit housing co-operatives regardless of the occupant's status as a member or non-member, the Order of Commissioner Richardson was set aside.

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IN THE MATTER OF: 540 Sherbourne Street
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Toronto Apartment Buildings Company Ltd. (Landlord)

APPEAL PANEL: W.D. Biggar, N.L. Myrhorod, G.R. Tait

DATE OF ORDER: March 14, 1985

FILE NUMBER: A-2718

ISSUES: Exemption - s.4(a) - whether accommodation "transient" - whether s.128 applies

The landlord appealed an Order of Commissioner Browes made pursuant to an application for rent review under s.126 of the Residential Tenancies Act.

The first ground of the landlord's appeal was that the Commission had no jurisdiction to hear the rent review application because the complex was exempt under s.4(a) of the Residential Tenancies Act. Counsel for the landlord argued that the complex was being operated as an "apartment hotel" for persons requiring short term accommodation. He claimed that for three years the landlord had been directing advertisements towards corporations sending people to Toronto for trade shows, seminars and conventions. In addition, he asserted that the complex at 540 Sherbourne Street was similar to other transient or apartment hotels located in Florida and England. The comparable characteristics that he stressed included daily, weekly or monthly rates, guest registration, payment by cash or credit cards, maid service, and individual kitchen facilities.

The solicitor then contended that the word "transient" in s.4(a) relates to the "living accommodation" and not to the occupants. He stated that the evidence clearly showed that the landlord's intent was to provide transient living accommodation. He concluded that the landlord's intent and the use of furnished units indicated that the accommodation provided was similar to that of a hotel and, therefore, s.4(a) exempted those units from rent control.

The Appeal Commissioners noted that s.4(a) exempts accommodation provided in a hotel, motel, inn, tourist home and hostel, and held that the words "or other similar accommodation" in that section do not expand the classes of transient living accommodation to which the exemption applies. They held that the accommodations must fit into one of the specified classes to qualify for the exemption.

The members of the panel stated that the similarities between hotels and 540 Sherbourne cited by the landlord had some weight but were inconclusive in the determination as to whether s.4(a) applies. They noted that there were differences also, such as the requirements for a rental deposit, a minimum stay, and 7 days notice to vacate. The panel stated that the Residential Tenancies Act applies to rental units in a residential complex regardless of length of stay or whether the occupants maintain other residences. They said that the purpose of the Act was to control rent increases within reasonable limits.

The panel concluded that the Legislature did not intend for the exemption in s.4(a) to apply simply by the introduction of furnishings and the provision of optional services which create a degree of similarity to a hotel. This, they stated, would be contrary to the general intent and object of the Act.

Therefore the panel concluded that the landlord's first ground of appeal failed and the exemption in s.4(a) did not apply.

The solicitor for the landlord raised a second ground of appeal in the alternative. He contended that the provision of furniture and new services created new rental units which permitted the landlord to set new first rents under s.128.

The appeal panel disagreed with this assertion. The panel stated that the physical layout of the units remained unchanged, so the landlord could not set new rents for them under s.128. To have the costs of the new services and furnishings recognized, the landlord could apply for a rent increase under s.126 of the Act.

The panel set aside the Order of Commissioner Browes on unrelated grounds.*

*Note: This decision is currently under appeal to the Divisional Court

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IN THE MATTER OF: Room 18
169 Fifth Avenue
Timmins, Ontario

BETWEEN: Paul Dallaire and Maura Dallaire (Landlords)
- and -
Graham McWhirter (Tenant)

APPEAL PANEL: J.H. Thomson, G.R.Tait, R.C. Yurkoski

DATE OF DECISION: May 9, 1985

FILE NUMBER: A-3726

ISSUES: Exemption - s.4(a) - "similar accommodation"

This was an appeal by the landlords from an Order of Commissioner Gillespie made pursuant to an application under s.129 of the Residential Tenancies Act for repayment of rent paid in excess of that allowed by the Residential Tenancies Act.

The landlord claimed that the Commissioner erred in law by deciding that the residential complex was not exempt from rent review under s.4(a) of the Act.

Counsel for the landlord presented evidence to show that the services provided at the complex at 169 Fifth Avenue, known as the Porcupine Inn Rooming House were similar to those provided in an inn. These included maid service, linen service and the acceptance of phone calls for the guests by the landlords. In addition, meals were available for residents and non-residents, and an occupant could vacate the premises without giving notice.

The landlord testified that the rooms were advertised as being available by the day or by the week and that 50% of the residents stayed for short periods ranging from 1 day to 6 months.

Counsel for the landlord then cited a number of cases which supported the argument that the services provided by the Porcupine Inn Rooming House and the relationship between the owners and residents were identical to an inn. She contended that the exemption in s.4(a) Residential Tenancies Act would apply in view of this situation. The solicitor stressed that the phrase "or other similar accommodation" in s.4(a) was important because if the panel ruled that the complex was not exactly an inn, there could be no question that it was similar.

The panel agreed with the submissions of the landlords' solicitor and held that the characteristics of the living accommodation and of the services provided by the Porcupine Inn were similar to those provided by an inn. Consequently, the panel held that the premises were exempt from rent review under s.4(a) of the Act.

Accordingly, the Order of Commissioner Gillespie was set aside and the application under s.129 was dismissed.

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IN THE MATTER OF: 194 Stuart Street
Kingston, Ontario

BETWEEN: Paul Bernard Wood (Tenant)

- and -

Queen's University, Department of Housing (Landlord)

COMMISSIONER: J.J. Ménard

DATE OF ORDER: October 17, 1984

FILE NUMBER: 129-035-KG

ISSUES: Exemption - s.134(1)(f) Residential Tenancies Act

This was an application by the tenant under s.129 of the Residential Tenancies Act for a rent rebate.

The landlord claimed that the Commission had no jurisdiction to hear this application because the rental unit was exempt from Part XI of the Residential Tenancies Act under s.134(1)(f).

The Commissioner found that the tenant was a staff member of Queen's University who lived in a unit which was provided by the University. He also found that there was no council or association for consultation regarding rent increases as envisaged in the latter part of s.134(1)(f). Commissioner Ménard stated that it was evident that Queen's University was an "educational institution."

Commissioner Ménard held that s.134(1)(f) provides an exemption from Part XI of the Residential Tenancies Act for educational institutions, but where a council or association exists for consultations regarding the proposed rent increase, the institution must consult with the council or association for the rent increase to be valid. He said that where no such council or association exists, the educational institution does not need to consult and there is no obligation in the Act on any party to organize a forum for consultation. The Commissioner stated that this situation arose from a straightforward reading of the statute although it may not lead to the most equitable result. He added that once a council or association was formed and the consultation process established, the educational institution would normally be bound to continue with the consultations to qualify for the exemption.

Based on these findings and conclusions Commissioner Ménard held that Queen's University was exempt from Part XI of the Residential Tenancies Act and dismissed the tenant's application.

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IN THE MATTER OF: Apartment A
40 Jolliet Avenue
Vanier, Ontario

BETWEEN: Robert Seifred and John Lunman (Tenants)
- and -
Halim Saikely (Landlord)

COMMISSIONER: J.J. Ménard

DATE OF ORDER: July 6, 1984

FILE NUMBER: 129-638-OT

ISSUES: Exemption s.134(1)(c) - where burdens of proof lie

The tenants applied under s.129 for a rent rebate and a declaration of the maximum lawful rent. The landlord argued that this residential complex was exempt from Part XI of the Residential Tenancies Act by virtue of s.134(1)(c) which exempts rental units situate in a building no part of which was occupied as a rental unit prior to January 1, 1976 from rent review.

Commissioner Ménard discussed the issue of where the burden of proof lies in this situation. He said that initially, the tenants had an evidentiary burden of proof. This burden requires that evidence be produced to avoid an adverse ruling by the trier of fact. As applicants, the evidentiary burden rests with the tenants although this can shift from time to time as further facts are proven. The Commissioner stated that in this case, the tenants discharged their burden by establishing that there had been a series of unlawful rent increases, which was not disputed by the landlord. Therefore, he said that they had established a prima facie case.

Commissioner Ménard stated that at this point, the landlord must either refute the facts (an evidentiary burden of proof) or establish a defence or an exemption (a legal burden of proof).

The Commissioner then cited with approval arguments presented by Commissioner Braund in a previous Order regarding the determination of where the legal burden rests. There are three principles which underlie this determination.

1. The onus lies upon the person who asserts a proposition of fact which is not self-evident. (This would apply to a landlord claiming that his premises are exempt).

2. There is some judicial approval for the proposition that the burden rests where the policy of the particular statute, and fairness dictate. With respect to the Residential Tenancies Act, the overwhelming purpose is the protection of tenants (Triassic Holdings Inc. v. Muirhead et al., 40 O.R. (2nd) 651), therefore the onus would lie with the party claiming the exemption.

3. The burden rests with the party who has "peculiar knowledge" of a fact or access to evidence of its existence to make it known (Pleet v. Canadian Northern Quebec Railway Co., (1921) 50 O.L.R. 223).

Commissioner Ménard was of the opinion that the first two considerations were sufficient to impose the legal burden of proof on the landlord, although he did not rule out the relevance of the third point.

The Commissioner then reviewed the landlord's evidence regarding the rental history of the complex. This included material which corroborated the landlord's testimony that the unit in question was owner occupied until 1970 and then occupied by the present landlord up to and including January 1, 1976.

The Commissioner concluded that on the balance of probabilities, based on the landlord's testimony and documentary evidence, the unit was not rented prior to January 1, 1976 and therefore was exempt from the Residential Tenancies Act by virtue of s.134(1)(c).

The tenants' application under s.129 was accordingly dismissed.

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IN THE MATTER OF:	27 Raymond Street Apartment 1 Ottawa, Ontario
BETWEEN:	Ian Soutar (Tenant) - and - A.T.E. Anderson (Landlord)
APPEAL PANEL:	G.E. Isaac, J.H. Thomson and G.R. Tait
DATE OF DECISION:	May 6, 1985
FILE NUMBER:	A-3704
ISSUES:	Exemption - whether renovations after a fire created a new building - s.134(1)(c)

At the initial level hearing, Commissioner Durbacz ordered the landlord to rebate excess rent paid by the tenant. The landlord appealed on the grounds that the subject unit was exempt from rent control under s.134(1)(c) of the Residential Tenancies Act.

The appeal panel found that there had been a fire in 1974 which rendered the building uninhabitable. After the fire, a demolition crew gutted the units at this complex leaving only the walls and the floors between the storeys. The panel also found that reconstruction was completed in 1977.

The landlord argued that the fire had rendered the building uninhabitable, therefore, it was not capable of being residential premises and the subsequent renovations had created residential premises where none existed before.

The members of the appeal panel placed considerable weight on the word "building" in s.134(1)(c). They stated that the structure existed before and after the fire, although the rental units inside were destroyed. They held that the reconstruction of the interior did not create a new or different building. As a result, the panel held that the unit was not exempt under s.134(1)(c) of the Residential Tenancies Act.

Accordingly, the Order of Commissioner Durbacz was affirmed.*

*Note: This Decision is currently under appeal to the Divisional Court.

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IN THE MATTER OF: 32 Bayfield Crescent
Toronto, Ontario

BETWEEN: Keith Noble - Applicant
- and -
St. John's Presbyterian Church - Respondent

APPEAL PANEL: G. R. Tait, J.H. Thomson and J.B. Jennings

DATE OF DECISION: May 2, 1985

FILE NUMBER: A-3797

ISSUES: Exemption - whether unit occupied by a minister of the landlord church was exempt under s.134(1)(c)

The tenant appealed a Decision of Commissioner Timney which determined that the Residential Tenancies Act did not apply to the subject premises.

Commissioner Timney had concluded that the exemption provided in s.134(1)(c) of the Residential Tenancies Act applied because the premises had not been rented until 1981. He found that from 1928 to 1981, the premises were provided by the landlord church to ministers as a term of their employment.

The tenant argued that the definition of "rent" in the Residential Tenancies Act included the employer/employee relationship where the minister provides religious leadership in consideration for the privilege of occupying the premises. He also noted that the 1975 assessment roll of the City of Toronto listed the Minister as being a tenant and the house as being tenant occupied. In addition, he asked the panel to consider s.10 of the Interpretation Act which directs that every Act be deemed to be remedial and should be interpreted so as to give effect to the object of that Act according to its true intent, meaning and spirit.

The solicitor for the landlord led evidence to show that the Church provides a residence for its minister only for the term of his employment. In addition, he claimed that the premises which are owned by the church and occupied by

the minister are often open to various church groups for meetings and other functions. The current minister did not require the premises, so the church rented them as of October 1981 with the verbal agreement that the tenant was to vacate the house should a minister require it.

The solicitor referred to s.2 and s.10(1) of the Religious Organizations' Lands Act. He argued that the property was utilized under s.2(b) which allows a religious organization to acquire and hold land as a residence for its religious leader. He stated that this does not create a landlord/tenant relationship but only that of a licensee/licensor. He noted that s.10 would create a lease, but claimed that the property was not used in the manner specified in that section. The solicitor then referred to legal authorities to contend that when premises are occupied for the purpose of carrying out employment obligations, no landlord/tenant relationship is created and no estate in land is passed to the occupant. He argued that the appeal panel must determine the type of relationship that existed between the church and the ministers. He said that the definition of "rent" becomes significant only if the panel determines that a landlord/tenant relationship existed. He stated that if the panel concludes that a licensee/licensor relationship existed, the definition does not apply because it speaks only of landlords and tenants.

The appeal panel determined that a class of persons known as licensees exists at common law, and that licensees have no more than a personal right of occupancy while tenants acquire an interest in land. The members of the panel noted that the minister's occupation of the premises would terminate when his role as spiritual leader terminated, and that the minister could not sublet or assign his right to the premises. Therefore, they concluded that the agreement between St. John's Presbyterian Church and its minister gave rise to a licensee/licensor relationship, not a landlord/tenant relationship and therefore Part XI of the Residential Tenancies Act did not apply to the premises. They noted that the Residential Tenancies Act specifically refers to boarders and lodgers, who are licensees, but otherwise speaks only of landlords and tenants. The panel stated that without specific direction in the Act to include agreements covered by license, the Act does not apply.

Having held that the premises were exempt under s.134(1)(c) of the Residential Tenancies Act, the panel affirmed the Decision of Commissioner Timney.

*Note: This decision is currently under appeal to the Divisional Court

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IN THE MATTER OF: Unit #1
322 Princess Street
Kingston, Ontario

BETWEEN: The Estate of George Edward Carson (Landlord)
- and -
Charles Steed and Barbara Steed (Tenants)

APPEAL PANEL: G.R. Tait, M.S. Green, R.S. Bentley

DATE OF ORDER: April 9, 1985

FILE NUMBER: A-3641

ISSUES: Exemption - whether unit was commercial
- s.134(1)(c)

The tenants applied for a rent rebate under s.129 of the Residential Tenancies Act.

At the initial level hearing the landlord contended that the unit was commercial and therefore exempt from Part XI of the Residential Tenancies Act. In support of this, the landlord raised a number of points. The building had originally housed only businesses and had always been assessed by the municipality at commercial rather than residential rates. In addition, the lease used by the landlord did not contain a restriction found in most residential leases which prohibits the use of the premises for non-residential purposes. The landlord also said that he always rented the units as commercial units and this character does not change merely because someone decides to sleep there.

The tenants responded by presenting evidence that the units had been rented as residential premises for years. They claimed that a number of tenants had lived in the units and worked elsewhere.

Commissioner Durbacz held that the units were residential. He stated that the determining factor was the presence of kitchens and showers which are rarely found in commercial units. He added that the form of the lease does not automatically classify the tenancy as commercial because tenancy agreements can be oral, written or implied.

The landlord appealed the Order of Commissioner Durbacz.

The panel agreed with the landlord's submission that the presence of a shower and kitchen is not determinative of the issue, but only one of a number of considerations. The panel also said that the municipal assessment was of little importance to this issue as it is ultimately the actual use of the unit which determines whether it is residential or commercial. However, the appeal panel found that the units had clearly been used as rented residential premises and so were not exempt under s.134(1)(c) of the Act. Since the evidence on this point was uncontradicted, the panel held that no further consideration of the issue was necessary.

The Order of Commissioner Durbacz was set aside on other grounds.

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IN THE MATTER OF: Apartment 1404
6 Assiniboine Road
North York, Ontario

BETWEEN: James D. Scoyne (Tenant)
- and -
York University (Landlord)

COMMISSIONER: D.J. Burnside

DATE OF DECISION: August 7, 1984

FILE NUMBER: 129-971-NY

ISSUES: Exemption - s.134(1)(f) Residential Tenancies Act

This matter came before Commissioner Burnside by way of an application by the tenant for a rent rebate pursuant to s.129 of the Residential Tenancies Act. The solicitor for the landlord argued as a defence to the application that York University was exempt from rent review under s.134(1)(f) of the Residential Tenancies Act.

Commissioner Burnside reviewed the evidence to determine if the requirements of s.134(1)(f) were met. He found that York University was undoubtedly an educational institution within the meaning of that section. The Commissioner then determined whether the "consultation" requirement of s.134(1)(f) was satisfied.

Counsel for the landlord filed a document entitled York University: Residence Budget Committee in support of his argument. This document stated that the purpose of the Committee was to provide a means for consultation regarding rent structure with those living in University residences, and to set out the process for this consultation.

The Commissioner found that the Residence Budget Committee was a body composed of members of the university administration and student representatives of the college residences and apartments. Further, he found that the Committee's procedure was to review the operating budget of the residences, and make recommendations as to the proposed rent structure. Commissioner Burnside stated that the 12.5% increase which gave rise to the tenant's application was unanimously approved by the Committee.

The tenant argued that the process should involve consultation with all tenants when rent increases are considered. Counsel for the landlord submitted that s.134(1)(f) requires consultation with a council or association and not with all the residents.

Commissioner Burnside accepted the landlord's arguments and held that the process set up by York University satisfied the consultation requirements of s.134(1)(f). He then went on to determine if consultation did in fact take place.

The Commissioner found that the University had difficulty in finding students who would represent the York University Tenants' Association on the Residence Budget Committee. An interested student was eventually found and a number of meetings took place. One of the student's responsibilities was to present the views of the tenants of the various residences at York University to the Committee. Commissioner Burnside held that this situation amounted to consultation as envisaged by s.134(1)(f) of the Residential Tenancies Act with respect to the increase recited in the tenant's application.

As a result of his conclusions, the Commissioner held that York University was exempt from Part XI of the Residential Tenancies Act and so dismissed the tenant's application due to lack of jurisdiction.

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IN THE MATTER OF:	121 Fourth Avenue, Apartment B Ottawa, Ontario
BETWEEN:	Miss Lauren Pruner (Tenant) - and - Mr. David Rourke (Landlord)
COMMISSIONER:	J.J. Ménard
DATE:	April 18, 1984
FILE NUMBER:	129-744-OT
ISSUES:	Exemption - whether s.4(a) Residential Tenancies Act applies

This application was made pursuant to s.129 of the Residential Tenancies Act for a declaration of the lawful rent chargeable and an Order for a rebate of any rents paid in excess of that amount.

The landlord claimed that the complex was exempt from the Residential Tenancies Act under s.4(a) because it was more similar to a hotel than a lodging house. The Commissioner noted that s.4(a) of the Act exempts transient living accommodation similar to a hotel while lodging houses are subject to rent control under s.1(l)(n).

The Commissioner found that the complex was a rooming house, which he held was the same as a lodging house. The Commissioner rejected the landlord's contention that the complex was more similar to a hotel than a lodging house because the units were rented by the month and there were no services that one would expect in a hotel (e.g. maids and desk clerks). He

also said that there was no similarity between the short stays normally experienced in a hotel and the extended stays experienced in a rooming house such as the landlord's where the units were rented out on a monthly basis, so the accommodations were not "transient" as contemplated in s.4(a).

In response to submissions made at the hearing, Commissioner Ménard stated that it was irrelevant that Part IV of the Landlord and Tenant Act might not have applied to rooming houses. He said that even though the applicant was a roomer under a license of occupation, this does not exempt the unit from the Residential Tenancies Act. The Commissioner held that under the Act a "tenant" includes a person who pays rent for the right to occupy a rental unit.

Having held that the unit was not exempt, the Commissioner then determined the lawful rent and ordered a rebate for rent paid in excess of that amount.

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IN THE MATTER OF: Lawrence Terrace
1440-1442 Lawrence Avenue West
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Landstake Investments Ltd. (Landlord)

APPEAL PANEL: J.H. Thomson, L.C. LeDuc, R.C. Yurkoski

DATE OF ORDER: October 10, 1984

FILE NUMBER: A-3492

ISSUES: Financial Loss - whether Commission has discretion to pass-through a financial loss arising from acquisition that exceeds 5% of annualized rents

The landlord applied under s.126 of the Residential Tenancies Act for rent review.

At the initial level hearing Commissioner Burnside found that the landlord had given the Vendor a third mortgage when the building was acquired in 1981. This mortgage was to have a term of five years and the interest rates were set at 6% for the first year, 8% for the second year and 10% for the remaining three years. The landlord claimed a $70,000 increase in financing costs and submitted that this increase resulted from the passage of time and not from the purchase of the property.

Commissioner Burnside accepted this increase in his calculation of financial loss even though it exceeded the statutory limit of 5% of the last total lawful rent imposed by the Residential Complexes Financing Costs Restraint Act. The Commissioner held that since the agreement was signed well before the drafting of the Residential Complexes Financing Costs Restraint Act, it was not an attempt to evade that Act. He said that it was fair to reflect the increase in the rents and allow the landlord to reach a break-even position in five years.

The tenants appealed this decision on the grounds that the Commissioner erred in failing to apply the provisions of the Residential Complexes Financing Costs Restraint Act. They contended that the Commissioner had no discretion to allow any amount of financial loss that exceeded the limitation imposed in that Act.

The appeal panel stated that the Residential Complexes Financing Costs Restraint Act was enacted specifically for the purpose of limiting the pass-through of financial loss. The panel held that the Commissioner did not have the discretion to overrule a specific enactment of the Legislature. Furthermore, the appeal panel stated that the escalating rate of interest was directly tied to the acquisition of the complex, therefore s.3 of the Residential Complexes Financing Costs Restraint Act applied, so any allowance made in respect of financial loss had to be restricted to 5% of the last lawful rents charged.

Accordingly, the panel reduced the amount of financial loss allowed by Commissioner Burnside to conform to the statutory limit.

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IN THE MATTER OF: 709 Kennedy Road
Scarborough

AND IN THE MATTER OF an application for rent review by 576047 Ontario Inc. (Landlord)

COMMISSIONER: D.B. Braund

DATE OF ORDER: May 9, 1985

FILE NUMBER: 126-424-SB

ISSUES: Financing Costs - shareholder loans - piercing the corporate veil

The landlord applied for rent review under s.126 of the Residential Tenancies Act.

The landlord claimed financing costs for the Projected Year of $44,688 related to an unsecured shareholder loan of $325,000. The landlord's agent stated that the loan represented the balance of the purchase price after the first two mortgages. He also confirmed that the loan was from the beneficial owners of the property to their trustee, the numbered company which held title. The agent stated that a 13.7% imputed rate of interest would be appropriate because that was the rate for the first mortgages and because third or fourth mortgages would have been required had those funds not been invested.

Commissioner Braund questioned whether it was appropriate to characterize an advance of funds by a beneficial owner to a trustee as a "loan". He was of the opinion that the transaction was not a "shareholder loan" which normally refers to a situation where a corporation owns certain assets as both legal and beneficial owner and borrows from its shareholders for the purposes of the corporation. He said that in the case at hand, the "lenders" may have been shareholders of the registered owner, but they were also the beneficial owners of the property through the trust agreement with the corporation.

The Commissioner referred to s.93 of the Residential Tenancies Act which directs that all decisions of the Commission shall be based on the real merits and justice of the case and that the real substance of all transactions be ascertained. In view of this, he stated that according to the law of trusts, a trustee (here the corporation) stands in the shoes of the beneficial owners only for the purposes of carrying out its obligations under the trust agreement. The Commissioner said that in all respects except registration, the persons who advanced the funds were the "owners" of the property. He said that the elements present which indicated ownership were that the "lenders" bore the risk of the investment, they would obtain all of the profits and capital appreciation (or suffer all of the losses and depreciation), and they had control of all decisions affecting the property.

The agent for the landlord submitted that a claim could be recognized in circumstances where the beneficial owners advanced funds depending on how the transaction was structured. The Commissioner responded by saying that the structure or outward form of the transaction had no significance, referring to section 93(2)(a) of the statute.

Commissioner Braund said that the essence of the transaction was not "borrowing" at all but the equity investment of the owners. He stated that the indicia of debt were not present and furthermore, that if the costs of the transaction were passed through to the tenants, they would be providing the landlord with a "return on investment" for which there is no provision in the legislation.

Commissioner Braund disallowed the claimed costs of the "shareholder loan".

The Commissioner went on to determine the justified rent increase for the complex.*

*Note: This Order is under appeal to a panel of the Commission.

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IN THE MATTER OF: 41 Dundonald Street
Toronto, Ontario

AND IN THE MATTER OF an appeal by Al-Ben-Gros Holdings Ltd. (Landlord)

APPEAL PANEL: H.F. Snyder, R.S. Bentley, R.C. Yurkoski

DATE: May 15, 1985

FILE NUMBER: 117-3505-TO

ISSUES: Financing Costs - whether non-arm's length mortgage should be accepted

Commissioner Wronecki disallowed the cost of a second mortgage in the course of determining the justified rent increases for this residential complex pursuant to an application by the landlord for rent review under s.126. The landlord appealed this finding.

The appeal panel reviewed the mortgage transaction which was admitted throughout to be non-arm's length since the loan was from a "father's company" to a "son's company". There were also interlocking officers and directors having authority as both borrower and lender. The landlord

contended that the secondary financing was nonetheless bona fide and should be allowed as a cost in the Commission's pass-through considerations. The tenants argued that the whole transaction was contrived to create artificial costs for the rent review process.

The majority of the panel concluded that the mortgage was bona fide and should be allowed. Having had the benefit of knowledgable witnesses that were not available at the initial hearing, the panel was able to clear up inconsistencies and errors upon which Commissioner Wronecki had based his decision.

Commissioner Snyder dissented from the Order of the panel. He agreed with the factual findings of the panel but disagreed with the conclusion that the second mortgage was bona fide. Commissioner Snyder determined that the borrower and lender were so close and interrelated that when one pierced the corporate veil as required by s.93 of the Act, one could not distinguish between them. He emphasized that the role of the Commission in this situation was to consider the pattern of activities relating to the complex and that in this case there were too many inconsistencies in the documentation to support the conclusion that the mortgage was bona fide.

The Commissioner went on to comment on the quality of evidence that would be desirable in a non-arm's length transaction. This would include:

- documentation that is as good as or better than that of an arm's length transaction
- that the transaction have the characteristics of a conventional commercial transaction
- documents that are accurate and consistent
- the existence of separate legal counsel for borrower and lender (this is not essential but would indicate that the interests of the parties are separate)
- that the applicant should freely present complete documentation to the Commission and that he be co-operative with the Commission in its practices and procedures.

Commissioner Snyder stated that he was not satisfied by the landlord's evidence with respect to the above characteristics.

In the result, the order of Commissioner Wronecki was set aside and substituted therefore with a new Order which included a consideration of the cost of the second mortgage.

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IN THE MATTER OF: Apartment 109
2181 Navaho Drive
Ottawa, Ontario

BETWEEN: Keng Lam Tong and Kin Jock Say (Tenants)
- and -
V.S.R. Investments Ltd. (Landlord)

COMMISSIONER: J.L.H. Sprague

DATE OF ORDER: April 9, 1985

FILE NUMBER: 129-427-OT

ISSUES: Illegal Rents - whether tenants could apply for a rebate under s.129 after reaching a settlement with the landlord

The tenants applied under s.129 for a declaration of the lawful rent chargeable and a rebate of any excess rent paid.

Commissioner Sprague found that the tenants had a lease that ran to August 1983, but which they terminated by written agreement with the landlord in May 1983. He stated that at the time of the agreement the landlord knew of the tenants' contention that the rent charged was contrary to the provisions of Part XI of the Residential Tenancies Act.

After hearing the testimony of all parties, the Commissioner concluded that the intention of both the tenants and the landlord was to end all financial obligations that existed between the parties through the signed agreement of May 1983. He stated that any rent paid in excess of that permitted by the Act fell within the term "financial obligation" as it was a debt which the tenants claimed was owed to them.

Commissioner Sprague was of the opinion that the tenants had two options in May of 1983. He said that they could have continued the lease until its termination in August 1983 and applied to the Commission for a rebate of excess rent paid. The other option would have been to strike a deal with the landlord. Because they wanted to terminate the lease early in order to leave the country, the tenants chose the latter course.

According to the Commissioner's calculations, the tenants saved $282 over and above what they would have been required to pay had the landlord refused to terminate the lease and had the tenants come to the Commission for a rebate for the twelve-month period. Therefore he concluded that there was nothing inequitable about the agreement made with the landlord. The Commissioner held that the tenants could not come to the Commission seeking a further rebate after having been released from the lease and having settled all financial obligations between themselves and the landlord.

The Commissioner addressed the applicability of s.2(1) of the Residential Tenancies Act which directs that the Residential Tenancies Act applies despite any agreement or waiver to the contrary. He held that this provision was not relevant to the ability of parties to settle claims for rebate for sums less than might strictly be owed. In addition, he said that s.102(1) of the Residential Tenancies Act and s.4 of the Statutory Powers Procedure Act allow claims to be settled through consent of the parties. Finally, he noted that s.93(1) of the Residential Tenancies Act which directs that every decision of the Commission be based on the real merits and justice of the case did not change the outcome of the situation because there was nothing inequitable about limiting the tenants to the terms of the agreement reeached in May of 1983.

In light of these conclusions, Commissioner Sprague dismissed the tenants' application for a rent rebate.

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IN THE MATTER OF: Unit #206
2341 Lakeshore Boulevard West
Toronto, Ontario

BETWEEN: Leonard Zita (Tenant)
- and -
Miriam McNiece (Landlord)

COMMISSIONER: R.H. TenBroeck

DATE OF ORDER: April 9, 1985

FILE NUMBER: 129-696-ET

ISSUES: Illegal Rents - whether charge for furniture was illegal

The tenant applied for a rent rebate under s.129 of the Residential Tenancies Act.

At the hearing, Commissioner TenBroeck established that the landlord named in this application had been a tenant of the unit in question. He found that she then sublet the apartment to the applicant, but charged an additional $85.00 a month for the use of her furniture which she had left in the apartment. The Commissioner noted that the monthly rent due to the building landlord did not include the additional $85.00.

The tenant claimed that he did not want the landlord's furniture and that the proper rent should not include the $85.00 charge.

Commissioner TenBroeck stated that the charge for furniture was unlawful. He referred to the definitions of "rent" and "services and facilities" in s.1 of the Residential Tenancies Act and concluded that the charge was actually an increase in rent which was not obtained in accordance with the requirements of the Act. He stated that the landlord should have applied under s.126 of the Residential Tenancies Act if she wanted to take a rent increase above 6% for the conversion of the unit from an unfurnished to a furnished apartment.

The Commissioner then calculated the overcharge of rent and ordered the landlord to repay that amount to the tenant. This Order was subsequently affirmed by an appeal panel of the Commission.

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IN THE MATTER OF:	Unit 406 890 Mt. Pleasant Road Toronto, Ontario
BETWEEN:	Geeta D. Mathew (Tenant) - and - Lampeter Investments Limited (Landlord)
COMMISSIONER:	D. Richardson
DATE OF ORDER:	September 17, 1984
FILE NUMBER:	129-607-TO
ISSUES:	Illegal Rents - issue estoppel - whether the finding of a lawful rent in a s.126 application is binding on a subsequent s.129 application

The tenant filed an application under s.129 of the Residential Tenancies Act for a rent rebate.

Counsel for the tenant submitted that the lawful base rent for the purposes of this application was already established by an Order of Commissioner Goodrow dated April 25, 1983 made pursuant to the landlord's application for whole building review. He contended that Commissioner Goodrow had made a quasi-judicial finding based on uncontradicted evidence, therefore the Commission had no authority to make any other findings concerning the lawful rent.

Commissioner Richardson explained the legal principle of res judicata or "issue estoppel" upon which the tenant's counsel relied. This principle, she stated, provides that once a judicial determination of a cause of action has been made, there is no authority to make a subsequent determination upon the same cause of action as it becomes a "thing adjudged". The first decision

binds the parties and, in the event of subsequent litigation between the same parties, the court or tribunal has no authority to inquire as to the validity of that first decision. The decision can be challenged only on appeal to a higher court or tribunal.

The landlord's agent submitted that the issues involved in a s.129 application differ from those in a s.126 application. He added that the landlord's failure to appeal Commissioner Goodrow's Order does not mean that he agreed with everything in it.

Commissioner Richardson referred to a number of legal authorities to determine if the principle of issue estoppel should be applied to this case. She commented that decisions in s.126 application are not considered to be binding in subsequent s.126 application even when the same issues arise. However, she said that in those cases, the parties to the application are different (since most s.126 applications involve multiple parties) and the principle of res judicata or issue estoppel does not apply between different parties.

Based on the authorities, the Commissioner decided that the principle of issue estoppel did apply to these proceedings. She stated that the issue raised in this case was exactly the same as the one dealt with by Commissioner Goodrow. Commissioner Richardson said that the landlord was trying to relitigate the same issue with evidence that was available at the time of the s.126 hearing. In response to the landlord's arguments, she said it was irrelevant that the landlord did not agree with everything in the Order because his only recourse was to appeal the findings of Commissioner Goodrow which he did not do.

As a result Commissioner Richardson ordered the appropriate rebate using the lawful base rent that Commissioner Goodrow had established in the s.126 Order.

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IN THE MATTER OF: Apartment 703
1303 Wilson Avenue
Downsview, Ontario

BETWEEN: Cathy Bessette (Tenant)
- and -
Luray Investments Ltd. (Landlord)

APPEAL PANEL: L.C. LeDuc, M.S. Green, R.C. Yurkoski

DATE OF DECISION: February 28, 1985

FILE NUMBER: A-3851

ISSUES: Illegal Rents - whether payment to 3rd party fell within definition of "rent"

The landlord appealed an Order of Commissioner Stanwick made pursuant to the tenant's application under s.129. The Commissioner had ordered the landlord to rebate $250.00 that the tenant had paid to a painting company. The Commissioner held that the payment was consideration for the right to occupy the rental unit which constituted "rent" under the Residential Tenancies Act. As such, she concluded that the payment was rent charged in excess of that permitted by the Act.

The landlord argued that the charge was not in consideration for the right to occupy the unit but a contract between the tenant and the painting company to have the apartment painted. Counsel for the landlord stated that the payment was not made to the landlord therefore the Commissioner erred in ordering him to repay money he had never received. A witness for the landlord testified that the landlord was able to select desirable tenants by determining if they would have their apartments painted, which was merely a business decision.

The appeal panel did not accept the landlord's submission. The panel stated that it was clear that the painting contract was not an option open to prospective tenants but a requirement. The agreement to have the unit painted if granted occupancy was held to be consideration given to the

landlord. In addition, the panel stated that the benefit of this agreement accrued to the landlord by way of a cost saving. The panel concluded that the payment was "rent" because it was a precondition to the occupancy of the unit and as such was in contravention of Part XI of the Residential Tenancies Act.

Accordingly, the Order of Commissioner Stanwick was affirmed.

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IN THE MATTER OF: Apartment 1511
15 Orton Park Road
Scarborough, Ontario

BETWEEN: Terry Sovie (Tenant)

- and -

Toronto Apartment Buildings Company Limited (Landlord)

APPEAL PANEL: L.V. Wilton, G. Tait, J. Pollock

DATE OF ORDER: March 14, 1985

FILE NUMBER: A-3719

ISSUES: Illegal rents - whether the Commission should notionalize increases when determining the lawful rent

The landlord appealed an Order which was made by Commissioner Braund pursuant to an application by the tenant under s.129 of the Residential Tenancies Act for a declaration of the lawful rent and a rebate of rent paid in excess of that amount.

One ground of the landlord's appeal was that Commissioner Braund erred by calculating the lawful rent chargeable for the unit without notionalizing rent increases that could have been taken in accordance with the legislation.

Commissioner Braund refused to "deem" rent increases permitted by the statute but not actually taken during the tenancy because he was of the opinion that this approach for calculating the lawful rent was not contemplated in the Residential Tenancies Act.

Counsel for the landlord argued that the Commissioner should have relied on Commission Guideline R.R.-8 which states that the amount of excess rent paid should be determined by calculating the difference between the rent actually paid, and the rent that could have been charged had the landlord complied with the rent review legislation. The solicitor contended that the Commissioner should have calculated a 6% increase effective August 1, 1983, and a further 6% increase effective August 1, 1984, to arrive at the proper lawful rent.

The appeal panel agreed with the solicitor's submissions and held that Commissioner Braund erred by not "deeming" rent increases in his calculation of the lawful rent.

The panel set aside the Order issued by Commissioner Braund.

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IN THE MATTER OF: 125 Neptune Drive, Apartment 1510
North York, Ontario

BETWEEN: Marianne Mason (Tenant)

- and -

Car-Allen Investments Ltd. and
Davhill Investments Ltd. (Landlords)

COMMISSIONER: D. J. Burnside

DATE: June 19, 1984

FILE NUMBER: 129-885-NY

ISSUES: Illegal Rents - Jurisdiction under s.129 Residential Tenancies Act

The tenant applied for a rent rebate under s.129 of the Residential Tenancies Act.

The basis of the tenant's claim was that she had a legal right to pay a lesser sum than that ordered in a Rent Review Order of the Commission.

Commissioner Burnside stated that this assertion does not give rise to a claim under s.129 of the Act. This section requires the Commission to make a finding that "the tenant has paid an amount of rent that is in excess of that permitted..." before a rebate may be ordered and the lawful rent declared. Such a finding could not be made here as the tenant could not claim that her rent payments exceed the maximum amount previously ordered.

Therefore, Commissioner Burnside concluded that he had no jurisdiction to consider the application.

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IN THE MATTER OF:	Apartment 11 31 Wasdale Crescent North York, Ontario
BETWEEN:	Fred Foster (Tenant) - and - Fanny Silberman (Landlord)
COMMISSIONER:	D.J. Burnside
DATE OF ORDER:	April 25, 1985
FILE NUMBER:	129-1182-NY
ISSUES:	Illegal Rents - can the Commission notionalize a rent increase

This was an application by the tenant for a rent rebate under s.129 of the Residential Tenancies Act.

Commissioner Burnside found that the landlord took an illegal rent increase in December 1983 when, legally, she should not have increased the rents until April 1984. He found that no increase was taken in April 1984 and presumed that this was because the rent had already been increased by over 18 per cent in December.

The Commissioner addressed the question as to whether he should notionalize a 6 per cent increase for April 1984 in his calculation of the lawful rent to put the landlord in the position she would have been in had she not taken the unlawful increase. He stated that there was no provision in the Residential Tenancies Act to notionalize an increase, but he could do so by applying the general principles of equity. In this case, however, the Commissioner held that he was unable to consider a remedy based on equitable principles because of the requirement that those who seek equity must do equity. He stated that it would be inappropriate to notionalize an increase for April after the landlord had taken an unlawful increase in December.

The Commissioner went on to declare the lawful rent and order a rebate of excess rents.

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IN THE MATTER OF: Apartment 412
30 Gloucester Street
Toronto, Ontario

BETWEEN: Gasba Investment Corp. (Landlord)
- and -
David Mathewson and Michael Agnew (Tenants)

APPEAL PANEL: L.C. LeDuc, G.E. Isaac, R.S. Bentley

DATE OF ORDER: April 23, 1985

FILE NUMBER: A-3700

ISSUES: Jurisdiction - can a tenant waive the amount of his claim that exceeds the monetary limit of the Commission's jurisdiction

The landlord appealed an Order of Commissioner Timney which was made pursuant to an application by the tenants for a rent rebate under s.129 of the Residential Tenancies Act.

One issue in this appeal was whether the tenants could waive the amount of their claim that exceeded the monetary limit of the Commission's jurisdiction which is set at $3,000 in s.84(3) of the Residential Tenancies Act.

Counsel for the landlord argued that since there is no provision in the Residential Tenancies Act which provides for any such waiver, the Commission loses jurisdiction in this situation. In support of this position, he cited s.13 of the Provincial Court, Civil Division Act which specifically allows a judge or clerk to permit the waiver of that part of a claim that exceeds the court's monetary jurisdiction. The solicitor stated that there was no such express authority to do this in the Residential Tenancies Act, and the Commission may not assume powers that are not set out in the statute.

The members of the appeal panel noted that it was the practice of the Small Claims Court to allow for claims exceeding its monetary jurisdiction to be waived without specific statutory authority to do so. In addition, they referred to s.101(c) of the Residential Tenancies Act which allows the

Commission to amend applications when it is justified and fair to do so. The panel stated that this provision permits amendments which reduce the amount of the claim, and when this serves to expedite the resolution of the matter it is fair and reasonsable.

Accordingly, the panel concluded that the Commission had jurisdiction to hear the application and affirmed the Order of Commissioner Timney.

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IN THE MATTER OF: 2 Nursewood Road
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Bryce Valley Holdings Ltd. (Landlord)

COMMISSIONER: C.M. Sokulsky

DATE OF DECISION: June 25, 1984

FILE NUMBER: 126-532-TO

ISSUES: Jurisdiction - whether landlord's failure to comply with s.98(1) Residential Tenancies Act deprives the Commission of jurisdiction

The landlord applied for whole building review pursuant to s.126 of the Residential Tenancies Act.

Commissioner Sokulsky reviewed the evidence concerning service of the landlord's application on the tenants as required by s.98(1) of the Residential Tenancies Act. She concluded that service had not been properly effected nor were the provisions of actual notice in s.99(4) satisfied.

The Commissioner then discussed the effect of non-compliance with s.98(1) of the Residential Tenancies Act. She referred to authorities which indicated that if an essential preliminary requirement has been disregarded, jurisdiction may be lacking. In the case of Re Grenoble Apartments (Toronto) Ltd. and

Residential Premises Rent Review Board (1977), 16 O.R. (2d) 40, the Divisional Court imposed a mandatory requirement regarding service of a notice of appeal. Furthermore, the Commissioner noted that s.98(1) of the present Act requires that copies of the application "shall" be given promptly. She stated that, normally, the word "shall" indicates a mandatory requirement. However, the Commissioner held that in this instance the use of the word "shall" is directory rather than mandatory, because s.98(4) gives the Commission the discretion to give written directions concerning the giving of copies. Compliance with these directions is then deemed to be compliance with s.98.

Therefore, the Commissioner concluded that failure to comply with s.98(1) deprives the Commission of jurisdiction to consider the application unless the Commission decides to exercise its discretion under s.98(4) of the Act. If the landlord complies with the written directions given pursuant to s.98(4), the Commission has jurisdiction to proceed.

Commissioner Sokulsky then reviewed the evidence to determine if the circumstances of this case warranted the exercise of that discretion. She stated that the tenants who were parties to the application, but who had not been served, had been prejudiced as they were not made aware of the contents of the application. The current application involved many complex issues and prompt service would have allowed the tenants to make informed decisions regarding their tenancies. Finally, she stated that the length of delay already experienced would make it inappropriate to exercise her discretion to give written directions, because it would have the effect of deeming service to be prompt, 14 to 15 months after the filing of the application.

Having declined to exercise her discretion under s.98(4) to give written directions in these circumstances, the Commissioner decided that she had no jurisdiction to consider the landlord's application for rent review.

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IN THE MATTER OF: 196 Cantin Street
Vanier, Ontario

AND IN THE MATTER OF an appeal by Bertrand H. Deslauriers (Landlord)

APPEAL PANEL: K.S. Sagoo, J.H. Thomson, A.D. Sandeman

DATE OF ORDER: November 27, 1984

FILE NUMBER: A-3452

ISSUES: Justified Increase - can the Commission order rents to be set out at their present level for a further twelve-month period

The landlord applied for whole building rent review under s.126 of the Residential Tenancies Act. Commissioner Ménard found a justified decrease in the rents which he determined he could not order under the legislation, so he ordered that the rents remain at the same level for another twelve months. One ground of the landlord's appeal was that the Commissioner erred in not granting an increase.

Two members of the appeal panel agreed with the Order of Commissioner Ménard. They stated that the Commissioner acted properly in making a provision in the Order setting out the rents at their present level for a further twelve-month period.

Commissioner Sandeman dissented from the conclusions of the appeal panel. He noted that s.131(5) of the Residential Tenancies Act states that where the Commission "has determined ... the total rent increase", the Commission "shall make an Order". Therefore, he stated, when the Commission is unable to determine that increase, it has no authority to make an Order and must dismiss the application.

Commissioner Sandeman stated that the specific provisions of s.131(5) should not be overridden by the general provisions of s.93(1), which directs that every decision of the Commission be based upon the real merits and justice of the case. He concluded that when the Commission cannot determine the justified rent increase, it loses jurisdiction to make an Order.

The Order of Commissioner Ménard was amended on unrelated grounds.

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IN THE MATTER OF: Apartment #408
285 Ontario Street North
Milton, Ontario

BETWEEN: Patsy McLean (Tenant)
- and -
Mayfair Construction Co. (Landlord)

COMMISSIONER: H.M. Little

DATE OF ORDER: April 30, 1985

FILE NUMBER: 129-602-HM

ISSUES: Lease - whether terms of the lease or the sub-lease prevailed - "surrender"

The tenant applied under s.129 for a declaration of the lawful rent and a rebate for any rent paid in excess of that amount.

The Commissioner found that on September 28, 1984, the tenant entered into both a subleasing agreement with the former tenant, and a lease with the landlord. He also found that the subleasing agreement provided for the use of two parking spaces while the lease contained a provision for the use of only one space. The tenant did not require a second parking space and sought a refund of the $18.00 per month paid for that extra space.

The landlord's manager contended that the subleasing agreement prevailed over the lease so the tenant was liable for the charge for the additional parking space.

Commissioner Little stated that he had to determine which of the documents took precedence or, in other words, if there was a "surrender" of the subleasing agreement by act and operation of law. He reviewed the legal authorities and quoted the case of Ozmund v. Young (1980) 28 O.R. (2nd) 229 which stated that surrender of a lease by operation of law occurs when:

"1. The old tenant gives up possession;

2. the landlord intends to take possession and put an end to the lease;

3. the landlord resumes possession, either personally or through a new tenant;

4. if the landlord relets the premises, all parties must agree that the new tenant is the lessee in place of the original tenant."

Commissioner Little found that the first tenant had parted with possession of the unit with the knowledge and consent of the landlord and the present tenant had taken possession of the premises also with the knowledge and consent of the landlord. Therefore, he concluded that there was a surrender by act and operation of law of any previous agreement (the subleasing agreement), and the lease entered into between the landlord and present tenant prevailed. In view of this, the Commissioner held that the tenant was liable to pay for only one parking space in accordance with the terms of the lease.

The Commissioner declared the lawful rent chargeable and ordered a rebate for the excess rent paid.

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IN THE MATTER OF:	Apartment 201 96 Jameson Avenue Toronto, Ontario
BETWEEN:	Leonard Stewart and Linda Stewart (Tenants) - and - Toronto Apartment Buildings Company Limited (Landlord)
COMMISSIONER:	D.B. Braund
DATE OF ORDER:	January 31, 1985
FILE NUMBER:	129-906-TO
ISSUES:	Limitation period - whether limitation period is two years or six years for a s.129 claim

The tenants applied under s.129 of the Residential Tenancies Act for a declaration of the lawful rent and a rebate of any rent paid in excess of that amount.

Counsel for the landlord raised a jurisdictional argument as a preliminary matter. The solicitor contended that there was a limitation period of two years for the commencement of an action under s.129 of the Residential Tenancies Act. He said that because the present application was made in March 1984, the Commission had no jurisdiction to order a rebate for any excess rent that may have been paid prior to March 1982.

Commissioner Braund referred to the Limitations Act s.45(1). Clause (g) of that section states that the limitation period is six years for an action "upon the case". The Commissioner noted that Guideline RR-8 suggests that clause (g) applies to s.129 applications. However, counsel for the landlord argued that the applicable clause was (h) which provides that the limitation period is two years if the action is "given by statute". He contended that the provisions of the Residential Tenancies Act abrogate rights of the parties under the common law and as such the applications created by the Act should be characterized as actions given by statute.

The tenants' agent agreed that the Limitations Act applied but contended that clause (g) relating to "actions upon the case" providing for a six year limitation period was the applicable clause. She referred to Guideline RR-8 and stated that the "rebate" in s.129 was not "a sum of money given by any statute to the Crown or the party aggrieved" which is the wording of clause (h).

Commissioner Braund reviewed the case law to determine the limitations issue. One of the cases he referred to was Thomson v. Lord Clanmorris [1900] 1 Ch. 718 decided by the English Court of Appeal. This case dealt with a claim for compensation provided in a statute and a limitation provision that contained virtually the same words as s.45(1)(h). The Court held that the section did not relate to claims for compensation, but only claims where penalty or punishment was the aim of the statute. Commissioner Braund noted that the Thomson case was still good law in Canada.

In view of the case law cited, the Commissioner stated that he had to decide whether an application under s.129 of the Residential Tenancies Act is a penal action or one for compensation. He held that there is no "penal" element whatsoever in a rebate Order, and stated that the claim is entirely one for "compensation" within the meaning of that word as it was used in Thomson v. Lord Clanmorris.

As a result, Commissioner Braund said that the weight of authority directed him to conclude that a s.129 application is in the nature of an action on the case even though clause (h) of s.45(1) of the Limitations Act might appear on its face to apply. Therefore, he held that clause (g) of s.45(1) applied and the limitation period was six years.

Accordingly, the landlord's motion was dismissed.*

*Note: The Order issued by Commissioner Braund was subsequently affirmed by an appeal panel of the Commission.

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IN THE MATTER OF: 67 Cartier Street
Ottawa, Ontario

AND IN THE MATTER OF an application for rent review by Sadler Court Apartments (Landlord)

APPEAL PANEL: E.J. Pollock, D.B. Braund, L.C. LeDuc

DATE OF ORDER: July 30, 1984

FILE NUMBER: A-3313

ISSUES: Management and Administrative Overhead - whether cost of constructing an on-site office could be claimed as a capital expenditure

The landlord applied for rent review under s.126 of the Residential Tenancies Act. As a result of that application Commissioner Menard issued an Order in which he disallowed the landlord's claim for $6,450 in capital expenditures. The landlord appealed that Order. One ground of the landlord's appeal was that the Commissioner erred in disallowing this claim.

Commissioner Menard found that the landlord had constructed an on-site rental office in the residential complex at a cost of $6,450. The Commissioner held that this cost could not be claimed as a capital expenditure because it was already accounted for in the landlord's claim for "Management and Administrative Overhead".

The appeal panel referred to the Guide to the Cost Revenue Statement which states that if the landlord claims 5% of the total revenue for Management and Administrative Overhead, no separate allowance will be made for management expenses. The panel stated that if the landlord had not built the rental office, it would have required an office elsewhere. The landlord had simply saved the rent costs of an outside office by building one on-site. The panel stated that if this office was treated as a separate capital expenditure, the landlord would be rewarded for having an office above the usual annual allowance for management costs which would not be allowed for landlords who maintain an outside office.

The panel suggested that in future reviews if the landlord wishes to prove a management cost above 5% of revenue with details of each constituent cost, the annual write-off of the $6,450 spent on the office should be included as deemed office rent.

Commissioner Ménard's Order was set aside on unrelated grounds.

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IN THE MATTER OF: Carlton Court Apartments
33 Wood Street
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by The Carlton Court Trust (Landlord)

COMMISSIONER: D.B. Braund

DATE OF ORDER: December 27, 1984

FILE NUMBER: 126-805-TO

ISSUES: Mixed-use complex - allocation of costs

The landlord applied for rent review under s.126 of the Residential Tenancies Act. The complex contained a hotel, residential units, and a few stores. One issue that arose was how to properly allocate the total costs for the project to the residential and commercial uses.

The landlord contended that the proper percentage allocation between uses was 52% residential and 48% commercial. He said that this was determined on a square footage basis, dividing common areas 50/50 between the two types of uses.

Commissioner Braund stated that, in general, allocation in a mixed-use building is an uncertain task and a number of approaches are available. He added that no single approach is inherently superior to the others in terms of reliability, but certain ones are more accurate for certain types of costs. The Commissioner set out several of the approaches available and the resultant percentage allocations.

1. Tax assessment approach - Using the assessments determined by the Ministry of Revenue the percentages were 39.9% residential and 60.1% commercial.

2. Revenue approach - By comparing the annual income generated the Commissioner arrived at an allocastion of 43.1% residential and 56.9% commercial.

3. Area approach - Using the accepted figures of 223,030 square feet for residential space; 205,22 square feet for hotel space; and 68,669 square feet for commercial use, the Commissioner calculated a residential/commercial split of 44.8%/55.2%.

4. Value approach - The commissioner obtained a report that had been made by a real estate appraisal firm and found that the individual values of each component of the complex were $9,800,00 residential and $14,425,000 commercial, which indicated a residential/commercial split of 40.45%/59.55%.

The Commissioner then stated that in a mixed-use project where financing costs are a major component of the financial loss it is appropriate to allocate part of the purchase price to the residential portion of the complex by determining what percentage of the mortgage loans advanced would the lender have allocated to the residential area had he put his mind to it. Commissioner Braund stated that the lender's allocation would be ruled by the revenue considerations and/or the value considerations. The Commissioner then averaged the value and revenue factors he had found to arrive at a financing and acquisition allocation of 41.8%/58.2%.

For operating costs and capital expenditures, Commissioner Braund decided to use the percentage allocation that was most relevant to the particular cost. When none of the factors was particularly logical in the circumstances and the actual allocation was not available, he used an "overall allocation factor." The Commissioner stated that the main factor related to such costs was area and the secondary factor was revenue. Therefore he calculated a weighted factor using twice area and one times revenue to arrive at an "overall" allocation of 44% residential.

In response to the landlord's submission that a 52%/48% residential/commercial allocation was appropriate, the Commissioner said that this was unsupported by the figures in the Cost Revenue Statement. He said that the allocation for costs relating to the residential portion of the complex was lower than 52% based on his calculations. Therefore Commissioner Braund rejected the landlord's submission.

The Commissioner went on to determine the justified increase for the complex.

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IN THE MATTER OF: 580 Kirkwood Avenue
Ottawa, Ontario

AND IN THE MATTER OF an application for rent review by Dale La Rose (Landlord)

APPEAL PANEL: L.C. LeDuc, J.H. Thomson and L.V. Wilton

DATE OF ORDER: March 7, 1985

FILE NUMBER: A-3651

ISSUES: Operating Costs - whether rent review fees are operating costs which may be passed through

The landlord appealed an Order of Commissioner Sprague made pursuant to an application for rent review under s.126 of the Residential Tenancies Act. One ground of the landlord's appeal was that the Commissioner erred by disallowing the costs for rent review.

Commissioner Sprague rejected the landlord's claim of $500.00 which was paid to the rent review consultant who acted as the landlord's agent at the hearing. The Commissioner stated that this fee was a cost of making an application to the Commission and not a cost relating to the operation of the building. He also said that the Commission may not consider these costs in determining the justified rent increase under s.131 of the Residential Tenancies Act and noted that his views on this point were in disagreement with Commission Guideline R.R.-18. In addition, the Commissioner said that it would be inequitable to the tenants to build these costs into the rent while the tenants are unable to recover the costs they incur by appearing before the Commission.

The members of the appeal panel disagreed with the reasoning of Commissioner Sprague. They stated that the costs of applying for rent review are directly related to the operation of the residential complex. The panel explained that landlords are businessmen who must seek rent levels that meet the operating costs incurred to ensure the viability of their operation.

The Appeal Commissioners stated that the inequity referred to by Commissioner Sprague was a matter of perception. They said that although the tenants are unable to recover costs they incur when appearing before the Commission, the whole scheme of the Residential Tenancies Act serves to protect their interests by ensuring that they pay only rent increases which are justified.

The panel also noted that Commission Guideline R.R.-18 clearly suggests that these costs should be considered as part of the operation of a residential complex and agreed with the reasoning of that Guideline.

The Order of Commissioner Sprague was set aside by the panel.

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IN THE MATTER OF: 4750 Bathurst Street
North York, Ontario

AND IN THE MATTER OF an appeal by Jack Jerry and the estate of John Jerry (Landlord)

APPEAL PANEL: M.S. Green, J.H. Thomson and R.C. Yurkoski

DATE OF ORDER: August 13, 1984

FILE NUMBER: A-3362

ISSUES: Procedure - s.117(5) - can the appeal panel extend the time limit for filing a Statement of Disputed and Additional Facts

This was an appeal of an Order of Commissioner Burnside with respect to an application for rent review under s.126 of the Residential Tenancies Act.

The landlord filed a Notice of Appeal and a Statement of Disputed and Additional Facts but the Statement was filed outside the time requirement of s.117(5) of the Act. The appeal panel heard arguments as to whether they had jurisdiction to accept that document.

The Panel noted that the Residential Tenancies Act deals with the Notice of Appeal and the Statement of Disputed and Additional Facts in separate sections, s.117(1) and s.117(5) respectively. The Panel concluded that the time limit for the filing of the Statement in s.117(5) was 7 days and there was no discretionary power in the statute to extend that period. It was the opinion of the panel that s.97 allows for discretionary extensions of time specifically for a Notice of Appeal or an application, but this cannot be applied to the Statement of Disputed and Additional Facts which is specifically covered by s.117(5). For these reasons, the panel decided to restrict the landlord's argument to the issues raised in the Notice of Appeal and did not accept the Statement which was filed beyond the statutory time limit.

The panel went on to review the landlord's arguments and ultimately affirmed the initial Order of Commissioner Burnside.

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IN THE MATTER OF: 186 Armstrong Street
Ottawa, Ontario

AND IN THE MATTER OF an application for rent review by Darlene Tilley (Landlord)

COMMISSIONER: J.L.H. Sprague

DATE OF ORDER: May 7, 1985

FILE NUMBER: 126-919-OT

ISSUES: Procedure - considerations when the landlord and tenant wish to agree on an Order under s.126

The landlord applied under s.126 of the Residential Tenancies Act for rent review for this one unit complex.

At the hearing, the Commissioner determined that the tenant was of the opinion that the landlord's request for a 10.17% rent increase was reasonable. He stated that the landlord and tenant were willing to consent to an Order for an increase of that amount.

Commissioner Sprague referred to s.4 of the Statutory Powers Procedure Act and noted that it gives the Commission authority to issue an Order on consent. However, he said that it must be recognized that an application for rent review involves not only a dispute between the current landlord and tenants, but also a performance of a public duty. In support of this, the Commissioner referred to the Divisional Court case of Re: Carfrae Estates Limited and Stavert et al (1976), 13 O.R. (2d) 537, which was decided under the Residential Premises Rent Review Act, 1975. In his decision, Mr. Justice Reid said that when withdrawal of an application is requested, it is necessary to consider the possible prejudice both to the parties involved, and to others who might be affected if withdrawal is allowed. Commissioner Sprague stated that the same criteria apply to an Order under s.126 of the Residential Tenancies Act which has been requested on consent.

The Commissioner did not believe that this "public duty" should necessarily result in the Commission disregarding the existence of the agreement between the parties nor should the Commission simply issue an Order on consent. He was of the opinion that the request should be seriously considered and the Commission should ensure that there is sufficient evidence to establish a lawful rent in the general area of that requested.

Commissioner Sprague reviewed the increased costs experienced by the landlord and concluded that the rent level agreed to by the landlord and tenant was reasonable. Accordingly, he issued an Order for that amount.

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IN THE MATTER OF: 261 Cooper Street
Ottawa, Ontario

AND IN THE MATTER OF an application for rent review by Maflor Investments Ltd. (Landlord)

COMMISSIONER: J.L.H. Sprague

DATE OF ORDER: August 7, 1984

FILE NUMBER: 126-637-OT

ISSUES: Procedure - whether an unincorporated tenants' association may be a party to a s.126 application

This was an application for rent review pursuant to s.126 of the Residential Tenancies Act.

At the hearing, a number of agency authorizations were filed by a solicitor who appeared as counsel for several tenants and for the Regency Towers Tenants' Association. The solicitor requested that the tenants' association be added as a party to the application pursuant to s.101 of the Residential Tenancies Act.

Commissioner Sprague raised two questions. Firstly, can an unincorporated tenants' association act as an agent for specific tenants? Secondly, can an unincorporated tenants' association be added as a party to a s.126 application pursuant to s.101?

With respect to the first question, the Commissioner noted that s.10(a) of the Statutory Powers Procedure Act grants any party to a proceeding the right "to be represented by counsel or an agent." Black's Law Dictionary and Osborn's Concise Law Dictionary define "agent" as a person who acts on behalf of another. In the Statutory Powers Procedure Act s.1(2), the meaning of "person" is extended to include unincorporated association.

The Commissioner also referred to a number of court cases in which unincorporated associations have sought standing as a party in an application. He said that the Courts have been more concerned with whether the association has a direct and substantial interest in the matter in question than with the association's legal standing as a person.

Commissioner Sprague explained that the Statutory Power Procedures Act incorporates minimum rules of natural justice into a code of required procedure for bodies in Ontario such as the Residential Tenancy Commission which exercise statutory powers of decision. He said that the purpose of s.10(a) of that Act is clearly to ensure the parties' right to representation at a hearing. As long as the "person" authorized as an agent is readily identifiable, such "person" should be allowed to act as an agent even if it is an unincorporated association. He held that in this case, the Regency Towers Tenants' Association was a readily identifiable group of people. The Association had in turn retained the solicitor to represent them at the hearing. Commissioner Sprague noted that Commission Guideline P-14 states that an unincorporated tenants' association may not be appointed as an agent, but chose not to follow it for the above reasons.

With respect to the second question, the Commissioner concluded that he did not have to decide if the association could be added as a party to this application. Since the solicitor represented both individual tenants and the association, with the same submissions, there was no necessity to add the association as a party. Commissioner Sprague suggested, however, that if he had to decide the issue, he would allow such an association to be added as a party pursuant to s.101 of the Residential Tenancy Act.

The Commissioner then went on to determine the rent increase justified in this application.

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IN THE MATTER OF: 657 Bethune Street
Apartment 5
Peterborough, Ontario

BETWEEN: Beryl Brooks-Effard (Tenant)
- and -
Richard Cavanaugh (Landlord)

COMMISSIONER: C.E. Harrott

DATE OF DECISION: April 29, 1985

FILE NUMBER: 129-405-PB

ISSUES: Renovations - whether s.128 applies

This was one of six applications by the tenants of the complex at 657 Bethune Street for rebates of rents paid in excess of that allowed by the Residential Tenancies Act.

The Commissioner found that the landlord carried out repairs and renovations to each apartment when it became vacant. He discussed whether s.128 of the Residential Tenancies Act, read in conjunction with Commission Guideline R.R.-9, allowed the landlord to set a new first rent for these units.

Commissioner Harrott held that the renovations done to units 1, 3, 4, 5 and 6 did not amount to a "significant" change in the "character" of the apartments as contemplated in s.128 and Guideline R.R.-9. He stated that the improvements to the electrical system, and the redecoration which was done were ordinary capital expenditures. He went on to comment that the addition of washers and dryers was "significant", but insufficient to amount to a significant change to the character of the unit.

However, he held that the landlord was entitled to set a new first rent under s.128 for apartment 2 because there was a significant change to the character of that unit. Originally, that unit had two rooms plus a bath, but after the installation of walls and doorways, it had a livingroom, kitchen, eating area, bedroom and bathroom.

In the result, Commissioner Harrott ordered a rebate for the tenant of apartment 5 and held that the landlord was permitted to set a new first rent for apartment 2.*

*Note: Rebates were also ordered for apartments 1, 2, and 4 and a settlement was mediated for apartment 6.

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IN THE MATTER OF: 260 Somerset Street West
Ottawa, Ontario

BETWEEN: Darrell Otto (Tenant)
- and -
Margate Company (Landlord)

COMMISSIONER: J.J. Ménard

DATE OF ORDER: July 23, 1984

FILE NUMBER: 129-878-OT

ISSUES: Renovations - whether s.128 applies

The tenant filed an application under s.129 of the Residential Tenancies Act for a declaration of the maximum lawful rent and for a rebate of excess rent paid.

At the hearing, the landlord raised s.128 of the Residential Tenancies Act as a defense to the s.129 application. He contended that because he had spent $10,000 in renovating the unit, its character had changed so significantly that a new unit was created. This, he argued, entitled him to set a new first rent under s.128 of the Act without regard to the six percent limit.

Commissioner Ménard listed the renovations done. These included provision of a new fridge, new tile flooring, new cupboards and counter top, a new sink and modification of the kitchen window. In the bathroom, new tiling was installed and a window was replaced by a vent. Also, the hardwood floors were sanded and varnished. The landlord claimed that all walls had been repainted.

The Commissioner referred to s.128 of the Act and to Rent Review Guideline #9 which suggests when it is appropriate for Commissioners to treat renovations as having created a new rental unit. He held that there must be a significant change in the character of the unit for s.128 to apply.

Commissioner Ménard viewed the subject unit and concluded that there was virtually no change to the character of the unit in this case. He said that these renovations were merely a series of minor capital expenditures or large repairs that would have been the proper subject of a s.126 rent review application. But, he held, they were insufficient to trigger the operation of s.128 through the application of Guideline #9.

The landlord then requested that the Commissioner consider that in the past, he took only 6% increases when his increased operating and financing costs justified increases well in excess of that amount. The Commissioner responded by explaining that this is not a consideration in a s.129 application. He stated that the option of applying for rent review or satisfying oneself with a 6% increase is a landlord's perogative with which the Commission will not interfere. Commissioner Ménard said that the Legislature did not intend for the Commission to embark upon a whole building review in the course of a s.129 rebate application.

The Commissioner then calculated the maximum lawful rent chargeable and ordered the appropriate rebate.

The Order of Commissioner Ménard was subsequently affirmed by an appeal panel of the Commission.

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IN THE MATTER OF: 1231-1287 White Oaks Boulevard and 392-408 Eton Place Oakville, Ontario

AND IN THE MATTER OF an application for rent review by Atwater Developments (Burlington) Limited (Landlord)

APPEAL PANEL: J.H. Thomson, N.L. Myrhorod, H.F. Snyder

DATE OF ORDER: May 15, 1985

FILE NUMBER: A-3710

ISSUES: Residential Complex - whether definition of "residential complex" includes land

Financing Costs - treatment when leasehold land on which complex is situated is purchased

The landlord applied for rent review under s.126 of the Residential Tenancies Act and an Order was issued. Both the landlord and tenants appealed that Order.

One ground of the tenants' appeal was that Commissioner Preston erred in his treatment of financing costs.

The appeal panel found that since 1971 the landlord had been leasing the land upon which the residential complex was situated. In 1983 the landlord's accountant determined that it would be more advantageous for the landlord to purchase the land because of the rising costs of the lease. The landlord purchased the land in 1984 at which time he renegotiated the mortgage on the complex to finance that deal.

The tenants' solicitor contended that the financing costs for this transaction should not have been allowed because the land was not part of the residential complex. He submitted that s.131(1) of the Residential Tenancies Act allows financing costs to be considered only in respect of the residential complex. The solicitor contended that the definiton of "residential complex" in the Residential Tenancies Act does not include land. He stated that in this case the residential complex was bought in 1971 and the subsequent transaction was essentially a refinancing which included the land. Therefore, he

concluded that since s.131(1) allows financing costs to be considered only wtih respect to the residential complex, the financing costs of the land must be disallowed.

Counsel for the landlord argued that the definiton of "residential complex" in the Act does not refer to land because it is assumed that buildings would be sitting on land. He contended that the purchase of the land should be considered under s.131(1)(a) as a cost of financing that the landlord has experienced or will experience in respect to the residential complex.

The appeal panel referred to legal authorities and held that land is part of a residential complex. In addition, the panel held that the transaction of 1984 represented an acquisition of the remaining portion of the residential complex.

The Appeal Commissioners stated that in this case, the cost of the lease was substituted by an acquisition cost of the land. As such, they held that the resulting increase in financing costs should be considered under s.131(2) which directs the Commission to consider increases in financing costs resulting from purchase of the complex only to the extent necessary to prevent financial loss. Accordingly, the panel held that Commissioner Preston erred in treating the change from the costs of the lease to the financing cost of the purchase of the land as an increase in financing costs.

The panel set aside the Order of Commissioner Preston.

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IN THE MATTER OF: 595 St. Clair Avenue West
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Audrey S. Tobias (Landlord)

COMMISSIONER: D. Richardson

DATE OF ORDER: June 22, 1984

FILE NUMBER: 126-648-TO

ISSUES: Residential Complexes Financing Costs Restraint Act - whether Commission can make an Order equalizing rents

The landlord applied for whole building review pursuant to s.126 of the Residential Tenancies Act.

At the time of the hearing, the landlord was in the process of effecting improvements to the units in the complex as they became vacant. The extent of these renovations ranged from minor repair work in some units to the gutting and refurbishing of others.

In view of the differences in the degree of renovations to the various units, one tenant questioned the possibility of equalization of rents in the Order so that the costs relating to units which had major renovations done would not be passed through to units which had minor or no renovations. The Commissioner referred to s.5 of the Residential Complexes Financing Costs Restraint Act and found that there was no authority in the Commisson to make such an Order. She stated that under the current legislation, the rents could be increased only on an equal percentage basis even though this would have the effect of passing through costs to units which had no improvements done to them. Commissioner Richardson noted that although this may not have been intended by the Legislature in enacting s.5 of the Residential Complexes Financing Costs Restraint Act, she had no discretion to relieve against this result.

The Commissioner then went on to determine the justified rent increase for the complex and apportioned it equally among the units on a percentage basis.

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IN THE MATTER OF: 922-924 Bathurst Street
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Frank Smokler (Landlord)

COMMISSIONER: D. Richardson

DATE OF ORDER: March 13, 1985

FILE NUMBER: 126-857-TO

ISSUES: Separate Charge - whether the landlord and tenants can deal with parking charges by agreement - s.5 Residential Complexes Financing Costs Restraint Act

The landlord applied under s.126 of the Residential Tenancies Act for whole building review.

At the hearing, the agent for the landlord and the spokesperson for the tenants requested that separate parking charges not be attached to particular units but that a general statement of the maximum charge be made. They claimed that this was the most desirable method of dealing with the changing parking requirments of the tenants as the parties could then reach an agreement on the appropriate charge to be paid. In addition, they submitted that if this was not allowed, landlords could charge for services and facilities that were unused and unwanted by the tenants which is contrary to the intent of the legislation.

Commissioner Richardson first referred to s.5 of the Residential Complexes Financing Costs Restraint Act which requires that the total justified rent increase be apportioned on an equal percentage basis to all the units in a complex. She stated that s.131(5) of the Residential Tenancies Act requires

the Commission to make an Order setting the maximum rent for each rental unit. She noted that "rent", in s.131(5) includes charges for services and facilities whether or not a separate charge is made for them. She added that Commission Guideline R.R.-19 suggests that the percentage rent increase found must be applied to all components of the rent charged which includes separate charges for parking. Therefore, the Commissioner held that the legislation required her to apply the increase to parking charges and then to apportion it among all the units in the complex in accordance with s.5 of the Residential Complexes Financing Costs Restraint Act.

In addition, Commissioner Richardson concluded that it was reasonable to assign a maximum separate charge for parking to particular units. The Commissioner stated that she was not persuaded by the arguments of the landlord and tenants. She said that one of the purposes of the Residential Tenancies Act was to provide certainty for parties as to the maximum lawful rent which may be charged, and the method of particularizing the components of the maximum rent enhanced that purpose.

The Commissioner went on to determine the justified rent increase for the complex.*

*Commissioner Richardson's Order was subsequently set aside by an appeal panel on unrelated grounds.

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